Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1994

KLEENWELL BIOHAZARD WASTE AND GENERAL ECOLOGY CONSULTANTS, INCORPORATED,

Petitioner,

v.

SHARON L. NELSON, Chairman;
RICHARD D. CASAD, Commissioner;
A. J. PARDINI, Commissioner;
Acting In Their Official Capacity As Members Of The Washington Utilities And Transportation Commission,

Respondents.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by holding that a state may require certificates of convenience and necessity for interstate commerce, which the state may withhold on the grounds that there is no need for the transportation service.

2. Whether the Court of Appeals erred by holding that, in a civil rights action against a state administrative agency, the state agency has the right to bind federal courts to the agency's determination of the facts made prior to the agency's actionable conduct and in an agency-initiated investigation.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Kleenwell Biohazard Waste and General Ecology Consultants, Incorporated ("Kleenwell")[1] petitions for a Writ of Certiorari from the February 9, 1995 opinion of the United States Court of Appeals for the Ninth Circuit. Petitioner submits this statement to demonstrate that the Supreme Court has jurisdiction of the Writ of Certiorari and that it should exercise that jurisdiction to review the decision of the Court of Appeals.

OPINIONS BELOW

The February 9, 1995, opinion of the United States Court of Appeals for the Ninth Circuit is reported in 48 F.3d 391 and is attached as Appendix A. The January 22, 1993, Administrative Order of the Washington Utilities and Transportation Commission is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court to review the February 9, 1995, opinion of the United States Court of Appeals is conferred by Title 28, United States Code, Section 1254.

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[1] Kleenwell has no parent company or non wholly-owned subsidiary. There are no parties to this case who are not listed in the caption.

RELEVANT CONSTITUTIONAL PROVISIONS AND OTHER STATUTES

Kleenwell asserts that the State of Washington violated the Commerce Clause of the United States Constitution, Article I, § 8, Cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

This violation occurred when the state applied its requirement for a certificate of convenience and necessity to interstate carriers. The state certificate requirement is contained in RCW 81.77.040.[2]

The proceeding which the state asserts bars the federal courts from making their own findings of fact was conducted under RCW 81.04.510[3] and RCW 81.04.110.[4]

STATEMENT OF THE CASE

Petitioner Kleenwell is a corporation which, since 1989, had been in the business of transporting medical waste. At the institution of this suit, it had approximately one hundred fifty customers. Kleenwell collected medical waste in the State of Washington, accumulated it at a temporary storage site in Washington, and then transported it to California for disposal by incineration. The accumulation was done solely for Kleenwell's convenience, making it more economical to transport the

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[2] *See*, Appendix C.
[3] *See*, Appendix D.
[4] *See*, Appendix E.

waste to California. The generators of the medical waste had no control over the waste after Kleenwell took possession of it and had no access to it while it was in temporary storage in Washington.

Respondents are the members of the Washington Utilities and Transportation Commission ("Commission"), a state regulatory agency empowered by state statute to supervise and regulate transportation of persons and property for hire by motor vehicle upon or over the public highways of Washington.

On January 3, 1992, the Commission issued a penalty assessment in the amount of $6,000 against Kleenwell for transporting medical waste out of state without a certificate of convenience and necessity from the Commission. Kleenwell responded to the assessment on January 21, 1992 by stating that "the transportation in question is interstate in nature." Kleenwell concluded "[t]he penalty assessment should be stricken." Kleenwell did not request a hearing or any proceeding on the Commission's jurisdiction.

On May 13, 1992, the Commission instituted an investigation *on its own motion*, under RCW 81.04.510 and RCW 81.04.110, to decide whether it had jurisdiction over Kleenwell. A hearing was held at which Kleenwell appeared. While the Commission was making this determination, it made no attempt to halt Kleenwell's business. On January 22, 1993, the Commission decided that Kleenwell was not engaging in interstate commerce and, even if it were, the Commission had a right to require a certificate of convenience and necessity. It ordered Kleenwell to cease and desist its operation. On February 19, 1993, the Commission denied Kleenwell's request to reconsider its decision. Kleenwell then filed this case.

Kleenwell filed the Complaint in this case, under Title 42 United States Code Section 1983, alleging that the Commission's certificate requirement, as it applies to Kleenwell, constituted a violation of the Commerce Clause of the United States Constitution. Jurisdiction was conferred on the District Court by Title 28, United States Code, Sections 1331 and 1343(3). Kleenwell requested a preliminary and permanent injunction, prohibiting the Commission from interfering, through the use of civil action, criminal warrants or otherwise, with Kleenwell's transportation of medical waste from Washington to other states, and attorneys' fees.

On April 23, 1993, Kleenwell presented its Motion for a Preliminary Injunction. On that date, from the bench, the District Court denied said Motion. Kleenwell filed a Motion for Reconsideration and a Motion for an Injunction Pending Appeal. Both Motions were denied on May 24, 1993. Kleenwell then filed its appeal of the District Court's denial of a Preliminary Injunction.

On September 10, 1993, the Commission presented its Motion for Summary Judgment. It based its motion on the argument that its own findings of fact were binding on the District Court and that those findings required that its motion be granted. On that date, from the bench, the District Court granted said motion. Kleenwell appealed the District Court's ruling, which was consolidated with the pending appeal on the denial of a Preliminary Injunction.

On April 6, 1994, the consolidated appeals were argued and submitted. On May 19, 1994, the Court of Appeals ordered the parties to brief the impact of this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994). Memoranda of Law

were submitted. On February 9, 1995, the Court of Appeals affirmed the decision of the District Court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals erred by holding that a state may require certificates of convenience and necessity for interstate commerce, which the state may withhold on the grounds that there is no need for the transportation service.

The Court of Appeals held that the State of Washington may require a certificate of convenience and necessity to transport medical waste in interstate commerce.[5] Under the Washington statutory scheme, a certificate will not be issued if the Washington Utilities and Transportation Commission decides that there is no need for the service.[6] There are a number of important reasons why a writ should be granted to review the decision.

A. *The decision rejected this Court's long-standing interpretation of the Commerce Clause.*

This Court has always held that a state may not require a certificate of convenience and necessity for

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[5] The Commission argued below that Kleenwell was not engaged in interstate commerce, but the Court of Appeals assumed that Kleenwell's operation was interstate commerce for purposes of its opinion. (*See, Appendix A, p. 24, fn. 14.)*

[6] *See,* Appendix C.

interstate commerce, when the certificate is granted only on a showing of need for the service. In *Buck v. Kuykendall*, 267 U.S. 307 (1925), this Court found that the State of Washington's certificate requirement violated the Commerce Clause when it was applied to carriers engaged in interstate commerce. In *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), this Court quoted the language in *Buck* which explained the objectionable nature of a certificate requirement.

> Writing for the Court, Justice Brandeis said of the law: "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner." Id., at 315-316.

114 S. Ct. at 1684.

This was not the only instance in which this Court made it clear that these certificate requirements are unconstitutional. *See Barnett v. New York*, 232 U.S. 14 (1914); *George W. Bush & Sons v. Maloy*, 267 U.S. 317 (1925). This Court has allowed a state to grant certificates for interstate commerce only when they are used solely for registration and are granted upon application, *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952), or when they are used merely to designate specific routes to eliminate traffic congestion and not to prohibit interstate commerce. *C. A. Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92 (1933). While the decision below interprets *Buck* to narrow its scope, this Court has always understood its holding:

> No license from local authorities or certificate of public convenience and necessity is required in respect of transportation that is exclusively interstate. Cf. *Buck v. Kuykendall*, 267 U.S. 307; *Bush Co. v. Maloy*, 267 U.S. 317.

Interstate Busses v. Holyoke St. Ry. Co., 273 U.S. 45, 51 (1927).

> The privilege of engaging in such [interstate] commerce is one which a State cannot deny. *Buck v. Kuykendall*, 267 U.S. 307; *Bush & Sons Co. v. Maloy*, 267 U.S. 317.

Sprout v. South Bend, 277 U.S. 163, 171 (1928).

Since *Buck*, this Court has only strengthened its holding. In *Dennis v. Higgins*, 498 U.S. at 439 (1991), this Court held violations of the Commerce Clause actionable under Title 42 United States Code Section 1983, basing its decision on the concept that engaging in interstate commerce is a "right," "not a franchise or privilege granted by the State." 498 U.S. at 448 (1991). Until Congress acts to alter or eliminate the right to engage in interstate commerce, the Commerce Clause operates as a "guarantee of freedom for private conduct that the State may not abridge." 498 U.S. at 450 (1991). The decision below finds that there is no such guarantee, that it's up to the states to decide whether interstate commerce can occur.

Even if this Court had never specifically addressed the issue, there still would be no problem understanding the constitutional infirmities of a state's certificate requirement for interstate carriers. This Court strictly

prohibits direct regulation of interstate commerce by the states, regardless of the purpose. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (plurality opinion); *Healy v. Beer Institute*, 491 U.S. 324, 337 fn. 14 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). There can be no more direct regulation of interstate commerce than a certificate requirement. When the avowed purpose of the obstruction of interstate commerce is to suppress or mitigate the consequences of competition between the states, the obstruction is direct by the very terms of the hypothesis. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 522 (1935).

The decision below acknowledges that the purpose of a certificate of convenience and necessity is to protect the revenues of existing businesses.[7] This Court, however, has recognized that "[p]reservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *West Lynn Creamery, Inc. v. Massachusetts*, 129 L.Ed. 2d 157, 174 (1994). Moreover, while the Court of Appeals justified accepting the Commission's actions on health and safety grounds, it ignored this Court's finding that the relation between earnings and sanitation is "too remote and indirect to justify obstructions to the normal flow of commerce in its movements between states." *Baldwin v. G.A.F. Seelig*, *supra*, at 524.

> The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class

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[7] *See*, Appendix A, p. 22.

or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when farmers of the state are unable to earn a living income. *Nebbia v. New York, supra.* Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.

Baldwin v. G.A.F. Seelig, supra, at 522-523.

Until this case, every lower federal court that has considered the issue has followed *Buck* and held that a state may never require a certificate to engage in interstate commerce, if, as in this case, issuance must be based on a showing of need. *See, Medigen v. Public Service Commission*, 787 F. Supp. 590 (S.D. W.Va. 1991) (listing eight such cases). State courts have likewise followed *Buck*, recognizing that "[t]he rule that a state cannot exact conditions for permission to do interstate commerce is one so well-known that it does not need citation of authority to support it." *Union Interchange, Inc. v. Parker*, 357 P.2d 339, 344 (Mont. 1960). *See, Port of Seattle v. Washington Utilities & Transportation Commission*, 597 P.2d 383, 390 (Wash. 1979); *State v. Atlantic Greyhound Corporation*, 113 S.E. 2d 57 (N.C. 1960); *Neven Bus Lines v. Public Service Commission*, 182 A. 80, 83 (Pa. Super. Ct. 1935); *State v. Sinclair Pipeline Co.*, 304 P.2d 930 (Kan. 1957).

"[T]he right to engage in interstate commerce is not the gift of a state . . . ." *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 535 (1949). Until the decision below, this was a universally recognized legal principle. The reason why it has become so is that this Court has "steadfastly adhered to the central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States.'" *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 280 (1987). It has understood the danger of permitting a state to restrict the free flow of goods.

> Our system fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home

> embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him for exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H. P. Hood, supra, at 539.

Under the statutory schemes of Washington and other states, franchises are granted to intrastate garbage and medical waste haulers. Customers are given little or no choice of service, or of rates. Interstate haulers provide a check on those monopolies. If the states let the intrastate haulers charge exorbitant fees to their customers, an interstate market is created. It becomes less expensive to send the waste to another state for disposal than to pay the rate of the monopoly. The decision below eliminates that check.

Kleenwell's service would have one of two effects. It would force the intrastate carriers to lower their rates, which they could do because they can use a local disposal site. Or, it would put the price gougers out of business. Either way, it would end the exploitation that the Commerce Clause was intended to prevent.

The decision below unsettles the settled. It opens a door to a method for states to interfere with interstate commerce long closed to them. *Buck* stood as a bulwark against state protection of established local interests against competition. The decision below removes it and signals the states that such protective behavior is now permissible.

B. *The decision rejected this Court's most recent application of the Commerce Clause to the interstate transportation of waste.*

This Court has issued a series of decisions on the interstate transportation of waste. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Chemical Waste Management, Inc. v. Alabama*, 112 S. Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan*, 112 S. Ct. 2019 (1992). Their overriding theme is that a state does not have the right to restrict the flow of waste into or out of the state. Most recently, in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), this Court struck down a flow control ordinance which prevented solid waste from leaving the state. It is a case whose facts mirror those of this case, but whose holding was rejected in the decision below.

Carbone dealt with the government grant of a waste processing franchise, which required all nonrecyclable waste discarded within the Town limits be delivered to the Town's designated transfer station. C & A Carbone was prohibited from taking its nonrecyclable waste out of the state under a law which was "not far different from the state law this Court found invalid in *Buck v. Kuykendall* . . . " 114 S. Ct. at 1684. This Court held that the ordinance violated the Commerce Clause "[b]ecause it attains . . . [its] goal by depriving competitors, including out-of-state firms, of access to a local market . . . ." 114 S. Ct. at 1680. "The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." 114 S. Ct. at 1681.

The present case involves the very state law that was found invalid in *Buck v. Kuykendall*. It involves the exclusion from a local market of a competitor who is using

an out-of-state disposal facility. It involves the hoarding of local waste, and the demand to get rid of it, for favored operators. All of this activity was objectionable to this Court in *Carbone*. The Court of Appeals, however, refused to follow that holding.

C. *The decision creates a split of authority between recent decisions of Courts of Appeal.*

The Court of Appeals for the Ninth Circuit, in its decision below, held that a state may require a certificate of convenience and necessity for the interstate transportation of medical waste. The Court of Appeals for the Fourth Circuit, in *Medigen v. Public Service Commission*, 787 F. Supp. 590 (S.D. W.Va. 1991), 787 F. Supp. 602 (S.D. W.Va. 1992), *affirmed* 985 F.2d 164 (4th Cir. 1993) held that such a certificate requirement violates the Commerce Clause. The issue in the two cases was identical. The results were the exact opposite.

This Court has established different levels of scrutiny to determine whether a State has overstepped its role in regulating interstate commerce. A state statute which directly regulates interstate commerce is generally struck down without further inquiry. *Edgar, supra*, at 641-642. When a state statute discriminates against interstate commerce on its face, or in practical effect, the State must demonstrate both that the statute serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131 (1986). When a state statute indirectly affects interstate commerce and regulates evenhandedly, this Court examines whether the state's interest is legitimate and whether the burden is clearly excessive. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

The Ninth Circuit used the lowest level of scrutiny, the *Pike* test, to determine the validity of the state's certificate requirement. The District Court in *Medigen* used the *Maine v. Taylor* test and the Fourth Circuit refused to decide which test was appropriate since the state could not meet even the *Pike* test. Thus, not only did the Ninth Circuit and the Fourth Circuit disregard this Court's absolute bar to the kind of state regulation at issue in this case, their cases have created an additional layer of confusion on the proper standard of analysis.

The Ninth Circuit has gone so far as to substitute an absolute constitutional prohibition with minimal federal review. This is particularly troubling given this Court's language in *Carbone*. In that case, a bar to interstate commerce was justified as necessary to ensure the safe handling and proper treatment of solid waste, the same excuse that is put forth in the decision below. This Court stated that "these arguments must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem." 114 S. Ct. at 1683. This is the *Maine v. Taylor* test. The Ninth Circuit used the *Pike* test instead, seemingly determined to grant the states a free hand to obstruct interstate commerce, regardless of this Court's explicit directions. *See, Healy v. Beer Institute*, 491 U.S. 324, 337, fn. 14 (1989). It is a situation that must be corrected and the absolute bar enunciated in *Buck* re-affirmed.

D. *The decision creates a mechanism for the states to ban the interstate transportation of waste.*

The Court of Appeals' refusal to follow *Buck* and *Carbone* has created a mechanism which states can use to control the flow of waste in or out of a state. A state may

prevent out-of-state waste from entering by merely requiring a certificate for the importing carriage, and then denying the resulting applications for failure to demonstrate need. If a state seeks to hoard its waste, it does what Washington has done in this case: require a certificate to take the waste out, and then deny applications to do it. Should a state desire to require export, it can grant certificates that specifically designate out-of-state disposal sites.

The state where waste originates, the state of its final destination, and any states in-between would be able to require certificates. The interstate transportation of waste could occur only if all of these states found that there was a need for it. Should any one state object, interstate transportation of waste would stop, leaving the courts in the position of attempting to glean the true reason for this decision, of acting as utility commissions to determine whether a carrier is entitled to a certificate. It is not hard to see that the courts will be largely unsuccessful in sorting out the motivations of such certificate cases. The Court of Appeals will have created a method to successfully circumvent this Court's decisions on this subject.

Under Washington's statutory scheme, a certificate is granted only if the Commission feels that there is a need for the service. That is its statutory mandate. This prohibition against services that are not needed means that the Commission will not distinguish between carriers who are injurious to a legitimate state interest and those that are not. Carriers who could meet the requirement of the *Pike* test would still be barred from interstate commerce, if the Commission felt there was no need for the service. Conversely, carriers who can demonstrate need do not have to establish that their business will serve the legitimate state interest. Need is enough. The Commission's certificate requirement, when it is applied to

interstate commerce, just cannot be made compatible with the U.S. Constitution.

This Court has approved blanket prohibitions when there was no other way to protect health and safety. *Maine v. Taylor, supra*. This case, however, does not invoke such a bar. Some carriers will be allowed to transport medical waste. Some will not, even though they would operate in exactly the same manner and move exactly the same kind of material as those who are granted a certificate. The Commission will not restrict the flow of harmful material. It will just be denying some carriers the right to transport it. Under the decision below, engaging in interstate commerce is a privilege granted by the state. There is no "guarantee of freedom for private conduct that the State may not abridge," despite what this Court held in *Dennis v. Higgins, supra*, at 450.

Interstate commerce by its definition involves at least two states. U.S. Constitution, Article I, Section 8, Clause 3. A certificate requirement would permit a state to exert its control over commerce in another jurisdiction. A state could use the requirement to redirect that commerce, or stop it. It could use the requirement to hoard its own assets or protect established business from competition. The requirement could be used to Balkanize commerce, a long-standing fear of this Court.

The decision below, if not reversed, will change the nature of interstate commerce nationwide. States will be able to require certificates for more than just the interstate transportation of waste. They will begin to manipulate their new power over the commerce beyond their borders to stifle its flow for their advantage. Interstate commerce will no longer be based upon free competition, but upon the sufferance of the states. Each state will have a right to

veto interstate commerce if it does not believe that the commerce is needed. *Buck* wisely eliminated this possibility. The decision below has now made it a reality.

II. The Court of Appeals erred by holding that, in a civil rights action against a state administrative agency, the state agency has the right to bind federal courts to the agency's determination of the facts made prior to the agency's actionable conduct and in an agency-initiated investigation.

University of Tennessee v. Elliot, 478 U.S. 788 (1986) involved the claim of an employee that he had been improperly fired by the University due to his race. The employee requested an administrative hearing, to contest his proposed termination, before an independent, impartial judge. When the employee did not agree with the judge's determination, he sought to pursue his § 1983 civil rights claim pending in federal court. This Court held that the state agency's findings of fact were binding on the federal courts, when it was acting in its judicial capacity.

This Court of Appeals has now extended this case to force the victim of a civil rights violation to accept the facts as determined by its violator and to wait while the violator creates favorable conditions before engaging in the violation. The decision below will not only foreclose *de novo* review of a state's attempt to interfere with interstate commerce, it will profoundly affect the ability of federal courts to protect citizens from all kinds of improper state action.

A. *The decision misapplied* University of Tennessee v. Elliot.

The Court of Appeals, in the decision below, has decided that a state administrative agency can prevent a party with a federal constitutional claim against that agency from ever fully presenting that claim in federal court. The agency can achieve this, according to the Court of Appeals, by using a self-initiated investigation that permits the state agency to act as its own judge before it inflicts an injury, and prevents factual development of the claim before any other entity. It is stunning to think of the abuse to which such a holding can be put.

The Commission initially assessed a penalty against Kleenwell for operating its medical waste transportation business without a certificate of convenience and necessity. Kleenwell responded by warning the Commission that it was engaged in interstate commerce and thus exempt from the certificate requirement. Kleenwell did not ask for any determination by the Commission of its jurisdiction. Kleenwell did not request a hearing. Kleenwell did nothing to begin any proceeding.

At this point, the Commission could have sought civil enforcement of its penalty in court. This would have meant, however, that an independent entity would have been presented with Kleenwell's claim that the Commerce Clause bars the Commission's actions. The Commission did not pursue this course. It made no attempt to stop Kleenwell's operation or collect those penalties. Instead, the Commission, on its own motion, initiated an investigation before itself to decide how to handle Kleenwell.[8] While a hearing was held and an initial

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[8] There can be no question that the Commission's

decision entered by an administrative law judge, the Commission had the right to make the final decision and it exercised that right.

On January 22, 1993, the Commission decided that Kleenwell must obtain a certificate of convenience and necessity from it to transport medical waste from Washington to California for disposal. The Commission made nine findings of fact.

After the Commission denied Kleenwell's request to reconsider its decision, Kleenwell filed this suit. The Commission then claimed that the federal courts were bound by the Commission's own January 22, 1993, findings of fact. The Court of Appeals agreed.

The Court of Appeals has permitted Kleenwell, and future civil rights victims, to be trapped between the requirement of a final administrative decision and collateral estoppel. While the investigation was going on, Kleenwell could not file suit. A claim that the application of government regulations violates the Constitution is not ripe until the government has reached a final decision regarding the application of the regulations. *Williamson Regional County Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985). "The Court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *McDonald, Somer & Frates v. Yolo*

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proceeding should be termed an investigation. It was initiated under a statute which designates it as such. RCW 81.04.510. (*See*, Appendix D.) It involved an administrative agency taking steps to inform itself as to whether there was a violation of the law. This Court has found this kind of proceeding to be an investigation, not an adjudication, as was held in *University of Tennessee v. Elliot, supra. United States v. Morton Salt Co.*, 338 U.S. 632, 641-43 (1950); *United States v. Powell*, 379 U.S. 48, 57 (1964).

County, 477 U.S. 340, 348 (1986). On the other hand, when Kleenwell waited to see how far the Commission would go, it forfeited its right to the protection of the federal courts, according to the decision below.

The Commission, in its January 22, 1993, Order, made the finding that medical waste "poses a risk of serious harm to the health and safety of the general public."[9] Once it is permitted to present its evidence before an impartial tribunal, Kleenwell will be able to prove, like Plaintiffs were able to do in *Medigen v. Public Service Commission*, *supra*, that medical waste poses no danger to the public,[10] and that virtually every other state receives adequate medical waste disposal service without restrictive regulations such as the Commission has imposed. With the claim of health and safety eliminated as an excuse for the certificate requirement, the Commission's actions could not even meet the test in *Pike v. Bruce Church, Inc.*, *supra*.

University of Tennessee v. Elliot, *supra*, involved an adjudication requested by the claimed victim of discrimination. It only makes sense that he was not entitled to more than one factual determination. He chose the forum. In this case, the state began its own investigation, decided on its course of action, and then attempted to block Kleenwell from engaging in interstate

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[9] *See*, Appendix B, p. 64.

[10] In opposing the Commission's Motion for Summary Judgment, Kleenwell presented the District Court with the Affidavit of William A. Rutula, Ph. D, M.P.H., which included his article from the April 22, 1991, *New England Journal of Medicine*. The article explained that "there is no evidence that medical waste has led to disease in the hospital or the community." In fact, "household waste contains an average 100 times more microorganisms with pathogenic potential for humans than medical waste."

commerce. Kleenwell is denied even one impartial hearing. Before acting against Kleenwell, the Commission carefully laid the groundwork for its deprivation of Kleenwell's constitutional right to engage in interstate commerce. The Court of Appeals has now held that such action paid off by blocking Kleenwell from a full and fair determination of the facts.

The implication of the decision below for civil rights litigation is immense. Before a civil rights violation, a state agency which intends to engage in questionable conduct can insulate itself from federal court scrutiny by conducting its own proceeding and making factual findings that make litigation success very difficult for the victim. Potential defendants get to tilt future proceedings in their favor by the clever use of their own authority. The victims cannot pick the forum in which they wish to pursue their claim. Such a result is not called for by *University of Tennessee v. Elliot*, but it certainly will deprive future civil rights plaintiffs of their opportunity for relief.

Specifically in the area of interstate commerce, the decision below will virtually eliminate the suits authorized by *Dennis v. Higgins, supra*. No state needs to act in haste when deciding whether to interfere with a carrier's right to engage in interstate commerce. An investigation can always be held. The carrier cannot refuse to participate because the Commerce Clause grants no immunity from a state's investigation. *Natural Gas Company v. Slattery*, 302 U.S. 300, 307 (1937). Facts will be found and, at the state's leisure, a constitutional right deprived.[11] The state will have little to fear from a federal court which cannot

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[11] The quality of the justice that can be expected is demonstrated by the Commission's own Order which found that Kleenwell was not even engaged in interstate commerce. *See*, Appendix B, p. 38.

alter a single fact determined by the state. It is a grim scenario for the right to engage in interstate commerce, as this case amply proves.

This Court, in *St. Joseph Stock Yard Co. v. United States*, 298 U.S. 38 (1936), explained its concerns with allowing administrative agencies such authority:

> . . . Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded . . . . Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority . . .

298 U.S. at 52.

It is a concern which should still exist and which calls for a reversal of the decision below.

B. *The facts, even as determined by the Commission, bar the decision below.*

Assuming *arguendo* that the Court of Appeals was required to rely upon the Commission's findings of fact, those facts established that the Commission still could not impose its certificate requirement on the interstate transportation of medical waste. In fact, the decision below makes it clear that the regulatory scheme in question should never be acceptable under this Court's decisions.

The Commission made nine findings of fact.[12] Not a single finding should have prevented the application of *Buck v. Kuykendall*, *supra*. Rejection of *Buck*, however, still does not lead to the conclusion that the Commission's certificate requirement is constitutional.

The Court of Appeals recognized "[t]he regulatory scheme attempts to ensure the universal service at reasonable rates by issuing certificates within service territories and by regulating rates to ensure that certified carriers remain financially able to serve all of their customers."[13] Revenue generation is not a local interest that can justify discrimination against interstate commerce, however. *C & A Carbone, Inc. v. Town of Clarkstown*, *supra*, at 1684. "To give entrance to that excuse would be to invite a speedy end of our national solidarity." *Baldwin v. G.A.F. Seelig*, *supra*, at 523. Once the Court of Appeals acknowledged that the certificate requirement is used to ensure the economic security of the existing carriers by protecting them from the rigors of interstate commerce, it should have struck it down. *West Lynn*

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12 *See*, Appendix B, pp. 63-66.
13 *See*, Appendix A, p. 22.

Creamery, Inc. v. Massachusetts, supra. No fact found by the Commission could justify any other action.

The findings of fact would also not have supported the decision below if the Court of Appeals had used the test in *Maine v. Taylor, supra.* There was no finding that the Commission's certificate requirement was the only way to achieve a legitimate local purpose. The Commission would have to present substantially more evidence to justify a certificate requirement under those circumstances. Kleenwell is confident that it is a burden that the Commission could not meet.

CONCLUSION

WHEREFORE, Petitioner hereby respectfully requests that this Court grant the Petition for Writ of Certiorari from the United States Court of Appeals for the Ninth Circuit, for the reasons cited herein above.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kleenwell Biohazard Waste and
General Ecology Consultants,
Inc., a corporation,
Plaintiff-Appellant,

v.

Nos. 93-35546
93-35897

Sharon L. Nelson, Chairman;
Richard D. Casad, Commissioner;
A. J. Pardini, Commissioner;
Acting in Their Official Capacity
as Members of the Washington
Utilities and Transportation
Commission,
Defendants-Appellees.

D.C. No.
CV-93-05160-RJB

Appeals from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
April 6, 1994 - Seattle, Washington

Filed February 9, 1995

Before: Eugene A. Wright, Thomas Tang
and Stephen Reinhardt, Circuit Judges

SUMMARY

Individual Rights/Civil Rights/Constitutional Rights

The court of appeals affirmed a district court judgment. The court held that the Commerce Clause is not violated by the state of Washington's requirement that a company engaged in interstate waste transportation obtain a certificate of public convenience and necessity.

Appellant Kleenwell Biohazard Waste and General Ecology Consultants, Inc., a Washington corporation with all of its facilities located within the State, operated a medical waste collection and disposal service in an area of the State. As part of a comprehensive statutory scheme designed to ensure universal waste collection service in the State, all common carriers that transport solid waste are required to obtain a certificate of public convenience and necessity. Kleenwell applied to the Washington Utilities and Transportation Commission (WUTC) for a certificate, but its application was denied.

Kleenwell began transporting waste to California for disposal. The WUTC imposed a penalty assessment against Kleenwell for violations of the rule against operating without the required certificate. Kleenwell asserted that the assessment was invalid, stating that the transportation was "interstate in nature." The WUTC served Kleenwell with a complaint, order and notice of hearing initiating a "classification proceeding." The proceedings were adversarial and conducted before an Administrative Law Judge (ALJ) for an independent state agency. After

hearing testimony from both parties as well as from intervenors, the ALJ entered an initial order stating that the requirement that Kleenwell obtain a certificate of convenience and necessity did not violate the Constitution. The WUTC ordered Kleenwell to cease and desist operations until it obtained a certificate.

Kleenwell did not appeal the WUTC's ruling to the Washington state courts and did not reapply for certification. Instead, it filed suit against appellee members of the WUTC in federal district court, seeking preliminary and permanent injunctions to prohibit the WUTC from interfering with its waste transportation activities. The district court denied Kleenwell's motion for a preliminary injunction and granted the WUTC's motion for summary judgment. The court ruled that the doctrine of collateral estoppel barred Kleenwell from relitigating the facts found by the WUTC in the earlier administrative proceedings. The court held at [sic] the WUTC's imposition of a certificate requirement did not violate the Commerce Clause. Kleenwell appealed.

[1] The WUTC asserted that Kleenwell's decision to file a federal court action, rather than appealing the WUTC's adverse administrative decision to the Washington state courts, represented sufficient grounds for invoking abstention under *Younger v. Harris*. [2] However, the merits of this claim did not need to be addressed, because the WUTC did not raise the issue before the district court.

[3] The district court did not err in giving preclusive effect to the factual findings of the WUTC administrative proceeding. [4] The administrative proceeding concerned issues properly before the WUTC, and it was an adjudicate proceeding that provided an adequate opportunity for both parties to present their cases. [5] The factual findings of

the WUTC proceeding would be given preclusive effect in the state of Washington.

[6] The regulation in this case was designed to address a legitimate local concern and incidentally affected interstate commerce. The regulation was enacted to address ensuring the safe disposal of solid waste in rural areas. [7] The regulation does not discriminate against out-of-state interests; in-state and out-of-state firms may both obtain certificates under the regulations. In addition, the regulations do not prevent or discourage a firm that has obtained a certificate from processing waste out-of-state, nor do they make doing business in the State of Washington more costly for out-of-state companies relative to in-state firms. Thus, the regulation's constitutionality was to be analyzed under the *Pike* balancing test.

[8] Kleenwell did not meet is [sic] burden in this case. It did not point to the existence of anything more than an incidental burden upon interstate commerce. In addition, it did not provide evidence that the effects of the certificate requirement upon interstate commerce were "clearly excessive." [9] In fact, the record contained ample evidence suggesting that a certificate requirement in these circumstances does not violate the Commerce Clause. [10] The WUTC found that the challenged regulation serves an important safety concern, protecting against the hazards caused by indiscriminate waste disposal by generators of waste unable to obtain collection service. Any burden imposed on interstate commerce by the regulatory scheme is clearly incidental to its main goal of protecting the health and safety of Washington residents. Moreover, the certificate requirement's effect on interstate commerce imposes at most an insignificant burden upon interstate commerce. The effect of the regulation is not "clearly excessive" in relation to the substantial local benefits arising from it. Because the state's interest in

assuring the health and safety of its citizens clearly outweighs any burdens imposed upon interstate commerce, the Commerce Clause does not prevent Washington from imposing its certificate requirement.

COUNSEL

James T. Johnson, Seattle, Washington, and Mark E. Kauffelt, Charleston, West Virginia, for the plaintiff-appellant.

Steven W. Smith, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

Kleenwell Biohazard Waste and General Ecology Consultants, Inc. ("Kleenwell") appeals the district court's denial of a preliminary injunction and subsequent grant of summary judgment in favor of Sharon Nelson, Richard Casad, and A. J. Pardini, members of the Washington Utilities and Transportation Commission (collectively "the WUTC" or "the Commission"), in the 42 U.S.C. § 1983 action. Kleenwell claims that the state requirement that it obtain a certificate of public convenience and necessity from the WUTC in order to collect and transport medical waste violates the Commerce Clause because Kleenwell engages in interstate waste transportation.

We reject Kleenwell's contention that the state may not impose a certification requirement upon a firm engaged in

interstate commerce. Accordingly, we affirm the district court's decision to deny Kleenwell's request for a preliminary injunction and to grant the WUTC's motion for summary judgment.

FACTS

Kleenwell is a Washington corporation with all of its facilities located within the state. From 1989 to 1993, Kleenwell operated a medical waste collection and disposal service in the King County area, the most densely populated region of Washington. Kleenwell collected medical waste from customers and transported it to a rented warehouse, where the company stored it for up to 90 days before disposing of it.

In 1990 Kleenwell applied to the WUTC for a certificate of public convenience and necessity pursuant to RCW 81.77.040. As part of a comprehensive statutory scheme designed to ensure universal waste collection service in the state of Washington, all common carriers that collect, haul, and transport solid waste must obtain such a certificate.[1] Kleenwell's application was denied.

At the time that Kleenwell applied for the certificate, it disposed of waste within Washington state. After the denial, Kleenwell began transporting waste to California for disposal. In January 1992, the WUTC imposed a penalty assessment of $6,000 against Kleenwell for sixty violations of the rule against operating without the required

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[1] RCW 81.77.040 provides that:

> No solid waste collection company shall hereafter operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operations.

certificate. Kleenwell asserted that the assessment was invalid, stating that "the transportation in question is interstate in nature."

In April 1992, the WUTC served Kleenwell with a complaint, order, and notice of hearing initiating a "classification proceeding" pursuant to RCW 81.04.510 to determine (1) whether Kleenwell was operating a solid waste removal company without the required certificate, and (2) whether Kleenwell was exempt from state regulation because it engaged in interstate commerce. The proceedings were adversarial and conducted before an Administrative Law Judge ("ALJ") from the State Office of Administrative Hearings, an independent state agency. After hearing testimony from both parties, as well as from intervenor waste disposal companies, the ALJ entered an initial order stating that the requirement that Kleenwell obtain a certificate of convenience and necessity did not violate the Constitution. Finally, on January 25, 1993, the WUTC ordered Kleenwell to cease and desist operations until it obtained a certificate.

Kleenwell did not appeal the WUTC's ruling to the Washington state courts and has not reapplied for certification. Instead, in April 1993, Kleenwell filed suit in federal district court, seeking preliminary and permanent injunctions to prohibit the WUTC from interfering with its waste transportation activities.[2] The district court denied Kleenwell's motion for a preliminary injunction and subsequently granted the WUTC's motion for summary judgment. It ruled that the doctrine of collateral estoppel barred Kleenwell from relitigating the facts found by the WUTC in the earlier administrative proceedings and, on

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[2] In 1991, the Supreme Court ruled that Commerce Clause violations were actionable under § 1983, resolving a split between the circuits on that issue. *See Dennis v. Higgins*, 498 U.S. 439 (1991).

the basis of those facts, it held that the WUTC's imposition of a certificate requirement did not violate the Commerce Clause. Kleenwell timely appeals.

ANALYSIS

Before reaching the merits of Kleenwell's constitutional appeal, we must first address two threshold questions. First, should this court abstain from hearing Kleenwell's suit pursuant to the principles first set out in *Younger v. Harris*, 401 U.S. 37 (1971)? Second, did the district court err in holding that the factual findings of the administrative law judge have a preclusive effect upon the federal court proceeding?

I. Abstention

[I] The WUTC asserts, for the first time on appeal, that *Younger* requires this court to abstain from considering Kleenwell's claim. Under *Younger* and its progeny, federal courts should abstain from intervening in pending state judicial proceedings out of deference to the interests of comity and federalism. *See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626-27 (1986). Although *Younger* itself involved pending state criminal proceedings, later cases have extended its reasoning to require abstention in favor of certain state administrative proceedings. *See id.* Relying on such cases, the WUTC asserts that Kleenwell's decision to file a federal court action, rather than appealing the WUTC's adverse administrative decision to the Washington state courts, represents sufficient grounds for invoking *Younger*. The WUTC invites us to hold that *Younger* applies even when the relevant state administrative proceedings have been terminated, a holding that would conflict with the decisions of two other circuits. *See Cecos Int'l, Inc. v. Jorling*, 895 F.2d 66, 72 (2nd Cir. 1990); *Thomas v. Texas*

State Bd. of Medical Examiners, 807 F.2d 453, 456 (5th Cir. 1987).

[2] We need not address the merits of the WUTC's *Younger* claim, however, because the Commission did not raise this issue before the district court.[3] The Supreme Court has explicitly stated that, even when state administrative proceedings are pending at the time, "[a] State may . . . voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention." *Dayton Christian Schools, 477 U.S. at 626.*[4] Indeed, the Court noted that a state waives it right to raise *Younger* on appeal when, as here, it "expressly urge[s] . . . the District Court to proceed to an adjudication of the constitutional merits." *Id.* Accordingly, we hold that the state effectively waived its claim for *Younger* abstention, and we decline to address it.

II. The Preclusive Effect of the WUTC Factual Findings

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[3] As the Supreme Court has pointed out, *Younger* abstention is a jurisprudential rather than a jurisdictional question; it "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction . . . ." *Dayton Christian Schools*, 477 U.S. at 626.

[4] The WUTC, acknowledging that appellate courts generally will not consider arguments raised for the first time on appeal, nonetheless argues that we should consider its *Younger* claim because a change in the law has created a "new issue." *See In Re Professional Investment Properties of America*, 955 F.2d 623, 625 (9th Cir.), *cert. denied*, 113 S. Ct. 63 (1992). However, the case upon which the WUTC relies for its argument that a "new issue" has arisen was withdrawn and is no longer relevant to our decision. *See Nevada Entertainment Indus v. City of Henderson*, 8 F.3d 1348 (9th Cir. 1993) (per cruiam), *withdrawn*, 21 F.3d 895 (9th Cir. 1994).

[3] Kleenwell asserts that we should not reach the merits of the district court's decision on the ground that the court erred in giving preclusive effect to the factual findings of the WUTC administrative proceeding. Kleenwell thus asserts that we should reverse the district court's decision and remand for further factual inquiry. We disagree.

The Supreme Court outlined the standard for determining whether the factual findings of a state administrative proceeding should be given preclusive effect in federal court. In ruling upon a section 1983 claim, the Court held that

> when a state agency "acting in its judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

University of Tennessee v. Elliott, 478 U.S. 788, 799 (1986) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-422 (1966).

[4] It is clear that the WUTC hearing met the requirements of *Elliott*. The administrative proceeding concerned issues properly before the WUTC. *See* RCW 81.04.110 (authorizing the initiation of a complaint by the WUTC against a common carrier), 81.04.510 (providing that whether a person is conducting business in the state without the WUTC's approval is a question of fact to be determined by the WUTC), and 81.77.100 (allowing the WUTC to consider whether a regulation violates the Constitution and to construe it accordingly). In addition, the hearing was an adjudicative proceeding that provided an adequate opportunity for both parties to present their

cases. It was conducted in accordance with the stat APA guidelines for adjudicative proceedings and the WUTC's rules of practice and procedure, and it was presided over by an administrative law judge from the independent State Office of Administrative Hearings. Moreover, the parties were provided with proper notice and an opportunity to be heard, they were provided with proper notice and an opportunity to be heard, they were represented by counsel, briefs were filed, evidentiary objections were made, exhibits were admitted into evidence, and direct testimony and cross examination were allowed.

[5] It is equally clear that the factual findings of the WUTC proceeding would be given preclusive effect in the state of Washington. In *Shoemaker v. City of Bremerton*, 745 P.2d 858 (Wash. 1987), the Washington Supreme Court set forth the standard for determining when a state administrative agency's factual findings should bind the parties in a subsequent state court proceeding. It held that the findings of the Civil Service Commission had preclusive effect upon subsequent state proceedings because the determination "'entailed the essential elements of adjudication.'" *Id.* at 861 (quoting Restatement (Second) of Judgements § 83).[5] The court based its

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[5] The Washington Supreme Court also noted the other requirements for collateral estoppel:

> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Shoemaker, 745 P.2d at 860 (quoting *Malland v. Department of Retirement SystemI, 694 P.2d 16 (Wash. 1985)). As in* Shoemaker, these four requirements have been met in this case.

decision upon the fact that, as here, adequate notice was given to all the parties, evidence was introduced, witnesses were cross-examined, and counsel had an opportunity to formulate the legal and factual issues before the administrative agency. *Id.* at 862. Because the WUTC hearing met the requirements of *Elliott* and *Shoemaker*, we hold that the district court did not err in giving the WUTC's factual findings preclusive effect.

III. The Washington Regulation and the Commerce Clause

We now turn to the merits of Kleenwell's claim. Although we review the district court's denial of the request for an injunction under a different standard than we review its grant of summary judgment,[6] both decisions hinge upon the merits of Kleenwell's claim that the Washington regulation vilates the Commerce Clause. Accordingly, we begin our discussion with an analysis of this contention.

The Supreme Court has distinguished between two types of state regulations burdening interstate commerce: (1) those that directly burden interstate commerce or that discriminate against out-of-state interests and (2) those that burden interstate transactions only incidentally. Regulations that fall into the first category are generally struck down unless the state can demonstrate that a legitimate local interest unrelated to economic protection is served by the regulation and no less discriminatory alternative exists, *see Buck v. Kuykendall*, 267 U.S. 307

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[6] While we review de novo the district court's grant of summary judgment, *Weiser v. United States*, 959 F.2d 146, 147 (9th Cir. 1992), we review the decision to deny a preliminary injunction under a more deferential standard. *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 507 (9th Cir. 1988).

(1925), should control this decision. In *Buck*, the Supreme Court found that a requirement that interstate transporters obtain a certificate of convenience and necessity in order to use a highway between two states served no legitimate local purpose and was intended to prohibit competition. For these reasons, the Supreme Court held that the statute was unconstitutional, reasoning that "[i]ts effect upon such commerce is not merely to burden but to obstruct it." *Id.* at 315. Kleenwell maintains that the *Buck* line of cases stands for the proposition that a state may never require a certificate of necessity from any party engaged in interstate commerce, even if the requirement represents an incidental consequence of the state's attempt to address a legitimate local concern. Kleenwell also asserts that the *Buck* line of cases requires us to invalidate the state requirement because these decisions forbid "direct" regulation of interstate commerce. According to Kleenwell, Washington has "directly" regulated interstate commerce because it has promulated regulations that concretely affect a business engaged in interstate commerce. We disagree with both contentions.

First, Kleenwell's assertion that *Buck* establishes a *per se* rule against regulations like the one before us is undermined by three Supreme Court cases upholding the constitutionality of regulations requiring interstate businesses to obtain state permits. In *TV Pix, Inc. v. Taylor*, 396 U.S. 556 (1970) (per curiam), the Supreme Court affirmed a district court's decision upholding a state's imposition of a certification requirement upon an interstate company that operated a community antenna television business. In *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961), the Court upheld a requirement that an interstate drug company must obtain a certificate in order to conduct business in the state and to maintain a breach-of-contract action arising from business within the state. Finally, in *C.A. Bradley v. Public Utilities Comm'n*

of Ohio, 289 U.S. 92 (1933), it upheld the constitutionality of a state order denying a common carrier a certificate to engage in interstate commerce when the primary purpose of the regulation was to promote public safety.

Second, under Kleenwell's expansive interpretation of the term "direct," virtually any regulation of local markets, including those that our court and the Supreme Court have upheld, would, for example, appear to invalidate the Supreme Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), in which it upheld a statute that prevented producers or refiners of petroleum products from operating retail service stations within the state on the ground that the statute served the state's legitimate interest in correcting inequities in the distribution and pricing of gasoline. Similarly, Kleenwell's approach to the Commerce Clause would undermine our holding in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), in which we upheld a resolution requiring all active Oregon-based attorneys to purchase primary malpractice insurance from the state bar association because the provision furthered the state's legitimate interest in remedying the "failure in the unregulated market" and in "ensuring universal malpractice coverage" at rasonable rates. *Id.* at 1463.

Were we to adopt Kleenwell's interpretation of the term 'direct," we would, in effect, expand the term until it applied to any regulation that affects interstate commerce. It is clear, however, that the Supreme Court used the term "direct" to refer to regulations whose *central* purpose is to regulate commerce, usually in order to benefit local interests. We find no evidence that the Supreme Court intended *Buck* and its progeny to invalidate state regulations whose primary purpose is to address a legitimate local concern and whose incidental effect is to regulate interstate commerce.

To the contrary, in *Bradley* the Supreme Court explicitly rejected the interpretation of the Commerce Clause that Kleenwell urges us to adopt:

> It is contended that an order denying to a common carrier by motor a certificate to engage in interstate transportation necessarily violates the Commerce Clause. The argument is that under the rule declared in *Buck v. Kuykendall*, 267 U.S. 307 and *Bush & Sons Co. v. Maloy*, 267 U.S. 317, an interstate carrier is entitled to a certificate as of right; and that hence the reasons for the commission's refusal and its purpose are immaterial. . . . But [in those cases], promotion of safety was merely an incident of the denial. Its purpose was to prevent competition deemed undesirable. . . . *In the case at bar, the purpose of the denial was to promote safety; and the test employed was congestion of the highway. The effect of the denial upon interstate commerce was merely an incident.*

Bradley, 289 U.S. at 95 (emphasis added).[7]

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[7] Kleenwell's broad interpretation of the *Buck* line of cases is also undercut by the *Buck* decision itself. The Supreme Court's holding in *Buck* hinged upon the fact that the "primary" purpose of the regulation was to inhibit competi-tion. *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925). Moreover, the Court explicitly noted that "[it] may be assumed that . . . appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable." *Id.*

The Supreme Court's observation in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), also undermines the interpretation that Kleenwell invites us to adopt by clarifying that the state may, in its effort to address legitimate local concerns, regulate interstate commerce as long as the regulation is not unduly burdensome. The Court noted:

> it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern *which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it*. . . . When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation. . . such regulation has been generally held to be within state authority.

Southern Pacific Co., 325 U.S. at 767; *see also Kassel v. Consolidated Freightways Corp.* 450 U.S. 662, 669 (1981) (quoting *Southern Pacific Co.).*

Finally, Kleenwell's claim that the regulation before us "directly" burdens interstate commerce hinges upon the fact that the regulation denies Kleenwell full and unrestricted access to the local market rather than upon evidence that the interstate market as a whole, or out-of-state firms in particular, are burdened by the regulation. The Supreme Court has explicitly rejected the notion that any regulation that affects particular companies engaged in interstate commerce necessarily represents an impermissible burden upon it. In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), in which the Court upheld a Maryland statute banning producers or refiners of

petroleum from operating a retail service station within the state, it held:

> [t]he fact that the burden of state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce. . . . The crux of the appellants' claim is that, regardless of whether the State has interfered with the movement of goods in interstate commerce, it has interfered "with the natural function of the interstate market either through prohibition or through burdensome regulation." . . . *We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure of methods of operation in a retail market. . . . [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.*

Exxon Corp., 437 U.S. at 127-128 (emphasis added; citations omitted); *see also Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 474 (1981). Similarly, in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), we held that a provision requiring practicing attorneys to purchase malpractice insurance from the state bar association did not represent an excessive burden upon interstate commerce even though it effectively banned all out-of-state firms from selling malpractice insurance to attorneys practicing in Oregon. *Hass*, 883 F.2d at 1462. We concluded:

> The resolution does not affirmatively discriminate against interstate insurance transactions on its face; nor does it have

> such an effect. *In-state and out-of-state insurance companies are burdened in exactly the same way - all are effectively prevented from competing with the Bar to provide primary malpractice coverage.*

Id.

B. *Choosing the Appropriate Standard of Review*

Thus, in determining whether the *Buck* line of cases governs this claim or whether the *Pike* test should instead be applied, it is clear that we must consider the purpose of the state regulation as well as its effects. If the primary purpose of the regulation is to regulate interstate commerce and thus to invade the province of Congress, or if the regulation favors in-state interests over out-of-state interests, then it will generally be subject to rigorous constitutional scrutiny.[8] If, however, the regulation in question is designed to address a legitimate local concern and incidentally affects interstate commerce, we must use the *Pike* balancing test to determine whether the regulation can withstand constitutional scrutiny.

[6] It is clear that the regulation in this case falls into the latter category. As we discuss in greater detail below, the regulation was enacted to address a legitimate local

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[8] The Supreme Court has held that the party challenging the validity of the regulation has the burden of demonstrating that the regulation has a discriminatory purpose or effect. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Kleenwell, however, has produced no evidence in support of such a claim. Instead, it has relied entirely upon a Fourth Circuit decision that a similar certificate requirement in North Carolina "directly" burdened interstate commerce and upon the fact that the regulation prevented it from transporting waste in the state. *Medigen v. Public Service Comm'n of West Virginia*, 985 F.2d 164 (4th Cir. 1993).

concern: ensuring the safe disposal of solid waste in rural areas. *See infra* pp. 1607-9. Congress has explicitly found that the field of solid waste collection is properly subject to state regulation. *See* 42 U.S.C. § 6901(1)(4) (stating that "the collection and disposal of solid waste should continue to be primarily the function of State, Regional and local agencies"). The Supreme Court has consistently held that a state's power to regulate commerce is at its zenith in areas traditionally of local concern. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977). In addition, regulations that touch on safety are those that the Court has been most reluctant to invalidate. *See Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978).

[7] Moreover, this regulation suffers from none of the infirmities that plagued the regulations and statutes invalidated under the *Buck* line of cases. The regulation does not discriminate against out-of-state interests; in-state and out-of-state firms may both obtain certificates under the regulations. *Compare C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1683 (1994) (noting that the "essential vice in laws [that discriminate against interstate commerce] is that they bar the import of the processing service") *with South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 187 (1938) (noting that "the fact that [the regulations] affect alike shippers in interstate and intrastate commerce in large numbers within as well as without the state is a safeguard against their abuse") *and Hass v. Oregon State Bar*, 883 F.2d 1453, 1462-64 (9th Cir. 1989) (upholding a statute because "all providers - whether local or out-of-state - are equally disadvantaged vis a vis the Bar"), *cert. denied*, 494 U.S. 1081 (1990). In addition, the regulations do not prevent or discourage a firm that has obtained a certificate from processing waste out-of-state, nor do they make doing business in the state of Washington more costly for out-of-state companies

relative to in-state firms. *Compare C & A Carbone, Inc.*, 114 S. Ct. at 1682 (striking down a statute because "it allows only the favored [local] operator to process waste that is within the limits of the town") *and Hunt*, 432 U.S. at 350-51 (striking down a regulation because it made the cost of doing business greater for out-of-state companies than for in-state companies) *with Exxon Corp.*, 437 U.S. at 126 (holding that a regulation is valid because it "creates no barriers whatsoever against interstate [companies]; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market."). For these reasons, we analyze the constitutionality of the regulation under the *Pike* balancing test. *See Oregon Waste Systems, Inc. v. Department of Environ. Quality of the State of Oregon*, 114 S. Ct. 1345, 1350 (1994).

C. *Application of the* Pike *Balancing Test*

Before applying the *Pike* balancing test, we begin by noting the limits of our decision. Kleenwell premised its challenge to the state regulatory scheme entirely upon its belief that a state may not impose a certification requirement upon a waste disposal firm engaged in interstate commerce. It did not contend that the state's refusal to grant it a permit was improper, or that the regulation was invalid, for any reason other than the asserted impact upon interstate commerce. Instead, Kleenwell has consistently maintained that the imposition of a certificate requirement upon an interstate company engaged in the business of collecting, transporting, and disposing of medical waste necessarily represents an overly burdensome regulation upon interstate commerce. Accordingly we merely evaluate the general structure and purpose of the state's regulatory scheme and do not consider whether the specifics of its operation would withstand constitutional scrutiny.

The *Pike* balancing test recognizes that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." City of Philadelphia v. New Jersey, *437 U.S. 617, 623-24 (1978).* Accordingly, under the *Pike* test, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, *it will be upheld unless the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church,* 397 U.S. 137, 142 (1970) (emphasis added).

[8] As the party challenging the regulation, Kleenwell must establish that the burdens that the regulation imposes on interstate commerce clearly outweigh the local benefits arising from it. *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994), *cert. denied*, 1994 U.S. LEXIS 6989 (U.S. Oct. 3, 1994). Kleenwell has not met its burden in this case. First, it has not pointed to the existence of anything more than an incidental burden upon interstate commerce. Second, it has not provided evidence that the effects of the certificate requirement upon interstate commerce are "clearly excessive."

[9] In fact, the record contains ample evidence suggesting that a certificate requirement in these circumstances does not violate the Commerce Clause. The central purpose of the WUTC certification and rate regulation scheme is "to protect public health and safety and to ensure solid waste collection services are provided to all areas of the state." RCW 81.77.100. The WUTC found that medical waste poses a significant health risk to the public if not properly processed and that a uniform system of regulation is necessary to protect the public from that danger. It concluded that there is a particular need to

ensure service to rural areas at reasonable rates in order to reduce the incentive for illicit dumping in these areas.

The WUTC also concluded that the state's certification requirement guards against these risks by preventing "cream-skimming" in urban areas,[9] imposing a common carrier obligation, and regulating the safety practices of companies providing collection services. The regulatory scheme attempts to ensure universal service at reasonable rates by issuing certificates within service territories and by regulating rates to ensure that certified carriers remain financially able to serve all of their customers.[10]

The WUTC also made ample findings concerning the problems that can arise from an unregulated market. In addition to outlining the general risks involved when an unregulated collector enters the field of solid waste collection, the WUTC noted specific instances in which an unregulated company entered the market and provided service only to densely populated areas, where the greatest profits could be obtained. As a result, its regulated competitors were unable to provide services to less-populated areas at the current rate. The entry of unregulated companies led regulated companies to decide either to hike their rates in less-populated areas or to discontinue service in those areas. For those reasons, the WUTC made specific factual findings that (1) "unregulated entry would cause unfair and discriminatory pricing and a

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[9] Cream-skimming occurs when an unregulated business offers low rates to attract those customers who are the least costly to service, leaving the regulated companies to service the remaining customers. The record reveals that Kleenwell was engaged in this type of activity before the state forced it to cease its operations.

[10] Thus, the regulatory scheme allows certified carriers to subsidize service to rural areas by ensuring them access to more profitable, densely populated areas.

lack of service in areas of the state, and would result in improper disposal of infectious waste," and (2) "Kleenwell's operations detrimentally impacted universal service by existing biomedical waste collection companies."

Indeed, we find this case to be similar in many ways to our decision in *Hass v. Oregon State Bar*, 883 F.2d 1453, 1462-64 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), where we upheld Oregon's requirement that all practicing attorneys purchase malpractice insurance from the state bar association. In *Hass*, we held that the mandatory participation provision furthered Oregon's legitimate interest in addressing the failure of an unregulated market and in ensuring universal malpractice coverage at a reason rate. Because the provision burdened in-state and out-of-state insurance companies in exactly the same way - by preventing both from providing primary malpractice insurance to Oregon attorneys - we held that the benefits arising from the provision outweighed any incidental burdens the provision imposed upon interstate commerce.

[10] Similarly, in this case the WUTC found that the challenged regulation serves an important safety concern:[11]

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[11] Although the mere invocation of such a purpose cannot shield an overly burdensome regulation from constitutional scrutiny, we note that the Supreme Court has stated that

> regulations that touch upon safety . . . are those that "the Court has been most reluctant to invalidate." Indeed, "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." Those who would challenge such bona fide safety regulations must overcome "a strong presumption of validity."

by ensuring universal solid waste collection at a reasonable rate, the WUTC protects against the hazards caused by indiscriminate waste disposal by generators of waste unable to obtain collection service. Any burden imposed on interstate commerce by this regulatory scheme is clearly incidental to its main goal of protecting the health and safety of Washington residents. Moreover, the certificate requirement's effect on interstate commerce - preventing free entry and unrestricted competition in the field of solid waste collection - imposes at most an insignificant burden upon interstate commerce. The regulation does not prevent out-of-state carriers from operating within the state, nor does it prevent any carriers from disposing of waste out-of-state.[12] It treats interstate and intrastate carriers identically. Thus, the effect of the regulation is not "clearly excessive" in relation to the substantial local benefits arising from it.[13] Because under the *Pike*

Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981) (citations omitted).

[12] Indeed, the regulation may impose less of a burden upon interstate commerce than the provision in *Hass*. In *Hass*, the provision required attorneys to purchase insurance only from the state bar association, an in-state organization. In this case, both out-of-state and in-state firms may compete for the opportunity to transport and process waste in the state of Washington.

[13] The Fourth Circuit appears to have reached a different conclusion in *Medigen v. Public Ser. Comm'n of West Virginia*, 985 F.2d 164 (4th Cir. 1993), where it ruled that West Virginia may not deny a certificate of convenience and necessity to medical waste transporters engaged in interstate commerce. We note, however, that the Fourth Circuit found "no basis in the record . . . for concluding that competition in this market has had or will have any destructive effects." *Id.* at 167. Here, in contrast, there is extensive evidence in the record that supports the WUTC's finding that a regulated market is necessary to protect the health and safety of Washington residents. Indeed, the Fourth Circuit acknowledged that "where competition has destructive effects, regulation may be justified." *Id.*

balancing test the state's interest in assuring the health and safety of its citizens clearly outweighs any burdens imposed upon interstate commerce, we hold that the Commerce Clause does not prevent Washington from imposing its certificate requirement.

CONCLUSION

For the reasons outlined above, we hold that the district court did not err in granting the state's motion for summary judgment.[14] In view of our decision as to the merits of Kleenwell's appeal, the request for a preliminary injunction is moot. Accordingly, the district court's decision is

AFFIRMED.

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[14] Kleenwell asserts that summary judgment may not be granted because it was denied an opportunity to introduce evidence demonstrating that it engaged in interstate commerce. Because our decision is based upon the assumption that Kleenwell *is* engaged in interstate commerce, the denial does not prevent us from affirming the district court's decision.

APPENDIX B

(Stamped:) SERVICE DATE JAN 25 1993

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Determining the Proper Carrier Classification of:	) DOCKET NO.) TG-920304)
ENOCH ROWLAND, d/b/a KLEENWELL BIOHAZARD AND GENERAL ECOLOGY CONSULTANTS	) COMMISSION) DECISION AND) ORDER DENYING) ADMINISTRATIVE) REVIEW; AFFIRMING) INITIAL ORDER;) DIRECTING) COMPANY TO CEASE) AND DESIST

NATURE OF PROCEEDING: This is a classification proceeding pursuant to RCW 81.04.110 and 81.04.510. Its purpose is to determine whether the respondent is operating as a solid waste collection company without first having obtained a certificate of public convenience and necessity from the Commission authorizing such operations, and whether the carrier is subject to Commission regulation under Chapter 81.77 RCW or is exempt from state regulation because it is engaged in interstate commerce.

INITIAL ORDER: An initial order by Lisa A. Anderl, Administrative Law Judge, would conclude 1) that Kleenwell is operating as a solid waste collection company within the state as defined in RCW 81.77.010 and is

required by RCW 81.77.040 to have a certificate of public convenience and necessity from the Commission in order to conduct its operations; 2) that Kleenwell engages in intrastate collection and transportation; and 3) that the Commission can require Kleenwell to obtain a certificate of public convenience and necessity before engaging in operations without violating the federal Constitution or laws. The initial order would direct Kleenwell to cease and desist its operations until it obtains a certificate from the Commission.

ADMINISTRATIVE REVIEW: The respondent requests administrative review. It contends that it is engaging in interstate transportation, and that its operations are not subject to the certificate requirements of RCW 81.77.040 because state regulation of its operations violates the Commerce Clause of the U.S. Constitution.

COMMISSION: The Commission denies the petition and affirms the initial order. The initial order properly characterizes and evaluates the evidence. Kleenwell's operations are subject to Commission regulation under Chapter 81.77 RCW. Its activities constitute the common carrier activities of a solid waste collection company, and it has failed to secure the required certificate for lawful operation and should cease and desist from engaging in solid waste collection. Kleenwell is engaging in purely intrastate activity in collecting waste and in the transportation for collection. The collection of solid waste is a local function of singularly local concern. If subjecting Kleenwell's operations to regulation under Chapter 81.77 RCW in any way affects interstate commerce, the effect is indirect and minimal, and is wholly incidental to the operation of the statute in protecting legitimate state health and safety interests.

[1]* The traditional test for determining whether motor freight transportation of valuable commodities between two points in the same state is simply intrastate traffic or is a leg in an interstate movement is the shippers' fixed and persisting intent at the time of shipment.

[2] The movement of solid waste from in-state generators' premises to an in-state storage facility, where the solid waste collection company accumulates the waste for later shipment out of state, is intrastate activity subject to Commission regulation under Chapter 81.77 RCW. RCW 81.77.030; 81.77.100.

[3] The collection of solid waste is a local function of singularly local concern. RCW 81.77.100.

[4] The Commission's jurisdiction under Chapter 81.77 RCW is primarily the regulation of the local service of collecting solid waste for disposal; disposal is incidental to the transportation for collection. RCW 81.77.010; 81.77.030; 81.77.100.

[5] The purpose of Chapter 81.77 RCW is to protect public health and safety and to ensure that solid waste collection services are provided to all areas of the state where incorporated cities have not acted to regulate collection. RCW 81.77.100.

[6] The provisions of Chapter 81.77. RCW, including the requirement of a certificate of public convenience and necessity, can constitutionally be applied

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* Headnotes are provided as a service to the readers and do not constitute an official statement of the Commission. That statement is made in the order itself.

to the collection of solid waste in this state for disposal out of state. RCW 81.77.010; 81.77.100.

APPEARANCES: Steven W. Smith, assistant attorney general, Olympia, represents the Commission. James T. Johnson, attorney, Seattle, represents the respondent, Enoch Rowland d/b/a Kleenwell Biohazard & General Ecology Consultants. Boyd Hartman, attorney, Belevue, represents intervenor Ryder Distribution Resources, Inc. James Sells, attorney, Bremerton, represents intervenor Washington Waste Management Association. David W. Wiley, attorney, Belevue, represents intervenor American Environmental Management Corporation. Richard A. Finnigan, attorney, Tacoma, represents intervenor Rabanco Companies intervenors Clark County Disposal, Inc. and Buchmann Sanitary Service, Inc.

MEMORANDUM

This is a classification proceeding, initiated by the Commission on its own motion pursuant to RCW 81.80.110 and 81.04.510, to determine whether the respondent, Enoch Rowland d/b/a Kleenwell Biohazard and General Ecology Consultants ("Kleenwell")[1], is operating as a solid waste collection company without first having obtained a certificate of public convenience and necessity from this Commission authorizing such operations; and, if so, whether Kleenwell's operations are subject to regulation under Chapter 81.77 RCW or are exempt from regulation by operation of federal Constitution and law.

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[1] The complaint was brought against Mr. Rowland as an individual operating under a d/b/a. Mr. Rowland incorporated the business in 1990, as Kleenwell Biohazard Waste and General Ecology Consultants, Incorporated.

An initial order would conclude that Kleenwell is operating as a solid waste collection company within the state as defined in RCW 81.77.010, and is required by RCW 81.77.040 to have a certificate of public convenience and necessity from the Commission in order to conduct its operations. It would conclude that Kleenwell engages in intrastate collection and transportation. It would conclude that the Commission can require Kleenwell to obtain a certificate of public convenience and necessity before engaging in operations without violating the federal Constitution or laws. The initial order would direct Kleenwell to cease and desist its operations.

Kleenwell requests administrative review of the initial order. On review, it contends that it is engaging in interstate transportation, and that its operations are not subject to the certificate requirements of RCW 81.77.040 because state regulation of its operations violates the Commerce Clause of the U.S. Constitution.

Kleenwell raises fourteen exceptions to the initial order's findings and conclusions. One group relates to findings that there is a lack of shipper (waste generator) intent to have the waste transported in interstate commerce. A second group relates to findings and conclusions that the Commission may regulate the intrastate collection of medical waste even though the waste is subsequently transported out of state. The remainder of the exceptions focus on Kleenwell's primary argument that the Commission's regulation of Kleenwell's activities would establish an impermissible burden on interstate commerce.

Kleenwell relies heavily on *Medigen of Kentucky, Inc., Medigen of Pennsylvania, Inc. v. Public Service Commission of West Virginia*, 787 F.Supp. 590 (S.D.W.Va. 1991), and *Medigen of Kentucky, Inc., Medigen of Pennsylvania, Inc. v. Public Service*

Commission of West Virginia, 787 F.Supp. 602 (S.D.W.Va. 1991) (collectively referred to as "*Medigen*"). West Virginia has a regulatory scheme that is similar to Washington's in requiring that transporters of medical waste obtain a certificate of convenience and necessity prior to engaging in the activity, and in granting service territories. In *Medigen*, the court held that West Virginia's requirement that motor carriers make a showing of convenience and necessity prior to engaging in the transportation of medical waste violates rights, under the Commerce Clause of the U.S. Constitution, of out-of-state corporations which engage solely in the interstate transportation of waste. Kleenwell claims that *Medigen* has virtually identical facts and should control the Commission's decision in this proceeding.

The Commission finds no merit in Kleenwell's contentions. The initial order properly finds that Kleenwell is operating as a solid waste collection company, and that it is engaging in *intrastate* operations which are subject to Commission regulation. It correctly distinguishes *Medigen*.[2] Its commerce clause analysis is consistent with the Commission's previous analysis: state regulation of the activity is not preempted; any burden on interstate commerce is at most incidental; the state statute advances legitimate local concerns; and the provisions of Chapter 81.77 RCW, including the requirement of a certificate of public convenience and necessity, can constitutionally be applied to the collection of solid waste in this state for disposal out of state.

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[2] In any event, a federal district court decision in another jurisdiction is not binding upon the Commission.

The petition for review should be denied. The initial order directing Kleenwell to cease and desist its operations should be adopted by the Commission.

I. Factual Background

The respondent operates a medical waste collection and disposal business in the greater King County area. The business is a Washington corporation and its sole shareholders and employees are Mr. Rowland and his daughter, both of whom are residents of Washington. The company provides a medical waste collection and disposal service for doctors and dentists. Kleenwell does not have a certificate from the Commission to engage in waste collection operations.

Mr. Rowland and his daughter are also the only shareholders in another Washington corporation which provides a consulting and laboratory service and sells medical supplies. Kleenwell chooses the customers it will serve primarily based on the business considerations of the medical supply corporation; ninety percent of Kleenwell's customers are also customers of the medical supplies company. If a customer of the medical supplies company requests removal of medical waste, Kleenwell provides the removal service. The Kleenwell collection and disposal service does not make a profit; the cost of the service is subsidized by Mr. Rowland's medical supplies business.

Kleenwell collects medical waste from the waste generators weekly. It provides its customers with disposal containers and instructions on the proper handling of medical waste. It prices the service according to container size. Kleenwell has no tariffs filed with any regulatory body.

Kleenwell transports the waste to a warehouse in the Seattle area where the waste is held in cold storage for up to 90 days until Kleenwell accumulates enough to justify transporting it out of state for disposal. Kleenwell transports the waste to California for disposal by incineration. The doctors and dentists who generate the waste have no interest in where the ultimate disposal site is located and do not care whether or not the waste is shipped out of state for disposal. The decision to dispose of the waste out of state is Kleenwell's, and Kleenwell would refuse a generator's request for in-state disposal.

In 1990, Mr. Rowland applied for certificate authority to collect medical waste pursuant to RCW 81.77.040, under Application GA-907. The Commission denied that application, concluding that the applicant failed to demonstrate his fitness to receive common carrier authority. Among the findings upon which a conclusion of unfitness was based was that Mr. Rowland had knowingly violated state health department regulations in storing medical waste. *See*, Exhibit 13. Respondent did not appeal that decision, and has no application for authority pending.

While Application GA-907 was pending, Kleenwell operated under temporary authority from the Commission. At the hearing in the present proceeding, respondent conceded that his company's operations are no different now from that period, with the exception that the waste he now collects is ultimately transported out of the state for disposal; when Kleenwell operated under temporary authority, the waste it collected was transported to Ferndale, Washington, for disposal.

Kleenwell began hauling waste to California immediately after the Commission denied application GA-907. The only reason Kleenwell changed to the out-of-

state disposal site was to attempt to avoid Commission regulation. The decision to dispose out-of-state was Kleenwell's alone. None of Kleenwell's customers objected to in-state disposal and non requested out-of-state disposal. It is twice to three times as expensive to dispose of medical waste at the California facility Kleenwell uses as it would be at Ferndale. There is nothing different in the handling and disposal of medical waste at the California facility that would justify, on business grounds, Kleenwell's change in disposal site.

II. APPLICABLE STATE LAW

Medical waste falls within the broader statutory definition of solid waste. RCW 81.77.010(9) and 70.95.030.

Chapter 70.95 RCW establishes a comprehensive state-wide program for solid waste handling to protect the public health and safety. It assigns primary responsibility for adequate solid waste handling to local government, reserving to the state those functions necessary to assure effective programs throughout the state.

Chapter 81.77 RCW assigns the Commission a role in the regulation of solid waste collection companies. RCW 81.77.030 directs the Commission to supervise and regulate every solid waste collection company in this state; RCW 81.77.020 exempts from Commission regulation operations under a contract of solid waste disposal with any incorporated city or town. With respect to foreign or interstate commerce, RCW 81.77.100 asserts the Commission's jurisdiction up to federal preemption.

RCW 81.77.100 states that the purpose of Commission regulation of solid waste collection companies is "to protect public health and safety and to ensure solid

waste collection services are provided to all areas of the state."

RCW 81.77.020 provides that no one who is subject to chapter 81.77 RCW may operate as a solid waste collection company in this state without complying with the provisions of the chapter. RCW 81.77.040 requires the holding of a certificate of public convenience and necessity from the Commission prior to conducting operations, and specifies some of the factors upon which a Commission determination to issue a certificate must be based. RCW 81.77.040 also provides that when an applicant requests a certificate to operate in a territory already served by a certificate holder, the Commission may issue the requested certificate only if the existing solid waste collection company serving the territory will not provide service to the satisfaction of the Commission.

RCW 81.77.010(7) defines a "solid waste collection company" as follows:

> 'Solid waste collection company' means every person . . . owning, controlling, operating or managing vehicles used in the business of *transporting solid waste for collection and/or disposal for compensation . . . over any public highway in this state* whether as a 'common carrier' thereof or as a 'contract carrier' thereof. (emphasis added)

In implementing Chapter 81.77 RCW, the Commission has adopted a comprehensive set of rules on the collection and transportation of medical waste. *See,* WAC 480-70-500 *et seg.* These rules require any hauler handling biohazardous, infectious, or medical waste to follow certain procedures and to comply with training

requirements, packaging and handling requirements, record-keeping, insurance and other requirements.

III. COMMISSION ANALYSIS

A. Kleenwell is Operating as a Solid Waste Company in Violation of RCW 81.77.040

The initial order properly concludes that Kleenwell is a "solid waste collection company" as defined by RCW 81.77.010(7). Kleenwell owns and operates vehicles used in the business of transporting medical waste for collection and/or disposal for compensation over the public highways of this state.

In light of the factual and statutory background, without considering Kleenwell's Commerce Clause claim, it is clear that Kleenwell is operating as a solid waste collection company without complying with chapter 81.77 RCW.

B. Kleenwell is Engaging in Intrastate Operations

Kleenwell claims that it is exempt from Commission regulation because it is operating in interstate commerce when it transports waste from Washington to California for disposal. It asserts that the initial movement from the generator to the Seattle storage facility is also interstate commerce.

The initial order concludes that Kleenwell's initial movement of waste from the waste generator to a Seattle area storage facility is intrastate in nature and wholly subject to state regulation. The initial order's conclusion is based on the particular facts of this case, and applies tests used in determining the essential character of motor carrier transportation.

The Commission affirms the initial order's analysis, but also reaches the same conclusion based on considerations peculiar to solid waste, without regard to the particular facts or traditional motor freight rules on which the initial order relies.

[1] The initial order bases its conclusion that Kleenwell is engaging in intrastate commerce on two facts. First, Kleenwell does not transport waste directly from Washington to California, but hauls it to an in-state warehouse where it stores and accumulates the waste; and, second, the waste generators do not care where the waste is taken. The traditional test for determining whether motor freight transportation of valuable commodities between two points in the same state is simply intrastate traffic or is a leg in an interstate movement is the shippers' fixed and persisting intent at the time of shipment. *Baltimore & Southwestern R.R. Co. v. Settle*, 260 U.S. 166, 57 L.Ed. 189, 43 S.Ct. 28 (1922). Because the testimony establishes in this case that the waste generators do not care whether the waste goes out of state or remains in the state, the essential character of the initial movement from the doctors' and dentists' offices to Kleenwell's in-state warehouse is intrastate rather than interstate. This character-of-commerce analysis is consistent with prior Commission decisions in motor freight carrier cases. *See*, Order M. V. No. 141041, *In re Silver Eagle Company*, App. No. E-19774 (March 1990); Order M. V. No. 137178, *In re Tim's Transfer, Inc./Steven D. Simon*, App. No. P-71108 (February 1988).

Kleenwell contends that the initial order's findings with regard to shippers' intent at the time of shipment are erroneous. We find no error. The waste generators in this case clearly are indifferent to whether the waste is disposed of in-state or out-of-state. Kleenwell seeks to invest its

customers with its own intent. Kleenwell's intent is of no legal significance.

The Commission believes that the particular facts of this case require a conclusion that Kleenwell is engaging in intrastate transportation for two additional reasons. First, the alleged interstate commerce is neither real nor bona fide. Kleenwell's medical waste collection service is strictly local in nature. Kleenwell could choose to dispose of the waste within the state, and could dispose of it more cheaply in the state. Kleenwell has chosen to take the waste across the state line for only one reason - to evade state regulation of the service.

[2] Secondly, if there is any interstate commerce at all, it does not begin until the waste has begun to move as an article of trade from one state to another. Although Kleenwell may anticipate that it will later haul the waste it gathers out of state, there is no commitment to commerce out of state until the waste has been collected in sufficient quantities. The carrying of commodities to a collection point where an interstate journey is to commence is not part of the interstate journey. *See, Burlington Northern v. Weverhauser Co.*, 719 F.2d 304 (9th Cir. 1983); *Sumitomo Forestry Co. Ltd., of Japan v. Thurston County*, 504 F.2d 604, 608 (9th Cir. 1974), *cert. den.* 423 U.S. 831 (1976). Under the facts of this case, Kleenwell's in-state collection operations are an intrastate activity.

[3] A more fundamental reason for reaching the conclusion that Kleenwell is engaging in intrastate activity lies in considerations peculiar to solid waste, and does not depend on the particular facts of this case. Solid waste collection is a local service not affecting interstate commerce. The citizens of other states have no interest in the collection of waste in localities in Washington. The basic function of a solid waste collection company is the

removal of unwanted waste. The principal concern of the "shipper" (waste generator) is not where the waste goes, but that it does go; there is no customer on the other end.[3] Unlike the transportation of freight having value, where the transportation is the essence of the transaction between the shipper and the hauler, the transportation of waste for disposal is incidental to the collection process, and irrelevant to the purposes of the "shippers." A collection company's election to follow the purely local function of collecting waste with an interstate movement of the collected waste does not make the collection process an interstate service.

[4] Chapter 81.77 RCW directs the Commission to regulate the "transportation *for collection* and/or disposal" of solid waste (emphasis added). It establishes criteria for entry into business in the territory of collection. The activity the statute references is local collection service; disposal is incidental to the transportation for collection. The chapter does not concern the adequacy of transportation facilities for conducting interstate commerce. The chapter does not authorize the Commission to regulate disposal sites.[4] Under Chapter 81.77 RCW, we are

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[3] Moreover, by the very nature of the service, the waste is commingled, precluding a shipper-by-shipper selection of specific disposal sites. Also, the state, through county comprehensive solid waste plans, has largely preempted any individual determination regarding disposal sites. *See*, chapter 70.95 RCW.

[4] Moreover, the legislature's grant of authority to the Commission to regulate transportation for disposal after the collection process is completed is limited by Chapter 36.58 RCW. RCW 36.58.050 provides, in pertinent part:

> When a comprehensive solid waste plan, as provided in RCW 70.95.080, incorporates the use of transfer stations, such stations shall be considered part of the disposal site and as such, along with the transportation of solid wastes between disposal

concerned with the adequacy and reliability of local solid waste collection service, a particularly local concern.

The Commission has consistently interpreted its jurisdiction under Chapter 81.77 RCW as primarily the regulation of the local service of collecting solid waste for disposal. In Cause No. TC-1859, *All County Disposal Services, Inc.* (August 1985), the Commission stated:

> . . . The activity here referenced is the transportation for collection; the disposal of the garbage and refuse thus collected may be at any point and the location of the disposal site is incidental to the transportation for collection. (Page 6).

> . . . Here, the state does not regulate the means of interstate commerce, but rather regulates the in-state aspects of the carrier's business which are central to the health, safety and welfare of the public. (Page 6)

The Commission made clear in *All County Disposal* and in Order M. V. G. No. 1451 App. No. GA-868 (November 1990), that the disposal site of collected waste is irrelevant to its jurisdiction. In *Sure-Way* the Commission stated:

> It is not necessary to request authority from the Commission to transport the waste across state lines and in fact the Commission has no power to grant authority of that nature . . . (Page 7)

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sites, shall be exempt from regulation by the Washington utilities and transportation commission as provided in chapter 81.77 RCW.

Other Commission decisions consistent with the above are: Cause No. TG-1911, *Evergreen Waste Systems, Inc.* (May 1986); Cause No. TG-2195, *Clark County Disposal, Inc., d/b/a Vancouver Sanitary Service and Twin City Sanitary Service, et. al. vs. Environmental Waste Systems, Inc., et. al.* (October 1989).

The Commission has never taken the position that the foreign portions of isolated longhaul movement of biomedical waste from a Washington warehouse to an out-of-state disposal facility is a movement over which the Commission exercises jurisdiction.

In short, the Commission regulates solid waste collection service, a local service of singularly local concern. Its regulation of transportation for disposal is incidental to regulation of collection service. Kleenwell's medical waste collection service is an intrastate activity which is subject to Commission regulation without regard to the location of the ultimate disposal site. Kleenwell cannot convert a local activity into interstate commerce by the simple expediency of hauling the unwanted waste across state lines.

C. Commerce Clause Hypothetical

Kleenwell contends that the application of Chapter 81.77 RCW to its activities is in violation of the provision of the U.S. Constitution, Article I § 8, conferring on Congress the power to regulate interstate commerce. It argues that Chapter 81.77 RCW and in particular the requirement of a certificate of public convenience and necessity is per se invalid because it is an attempt to effect direct regulation of interstate commerce and because its purpose and effect is economic protection.

The initial order, supposing for purposes of analysis that Kleenwell's collection and transportation to a warehouse is interstate commerce, rejects Kleenwell's Commerce Clause arguments. The Commission believes that the initial order's Commerce Clause analysis is correct. Supposing Kleenwell's operations to be interstate commerce, the application of Chapter 81.77 RCW to Kleenwell's activities would not violate the Commerce Clause.

[6] The Commission has previously considered the constitutionality of the application of Chapter 81.77 RCW to solid waste collection companies which dispose of waste outside the state. In Cause No. TG-1859, *All County Disposal Services, Inc.* (August 1985), the Commission ruled that a Washington corporation that collected waste in this state and disposed of it in Oregon was subject to the provisions of Chapter 81.77. The Commission found that the impact of Commission regulation on interstate commerce was negligible "if it exists at all." In Cause No. TG-1911, *Evergreen Waste Systems, Inc.*, the Commission reached the same conclusion on substantially similar facts except that Evergreen was an Oregon corporation. In both cases, the Commission rejected the same commerce clause arguments that Kleenwell makes in this proceeding. The Commission believes that its analysis in those decisions was and continues to be correct.

a. General Principles

Article I § 8 of the United States Constitution grants to Congress the power to regulate commerce among the several states. Although by its terms the Commerce Clause is an authorization for congressional action, the U.S. Supreme Court has long held that the delegation to Congress by the states is also a limitation upon state power to interfere with the movement of goods in interstate

commerce. *Cooley v. Board of Wardens*, 12 How (U.S.) 229, 13 L.Ed. 966 (1852); *H. P. Hood & Sons v. Dumond*, 336 U.S. 525, 93 L.Ed. 865, 69 S.Ct. 657 (1949); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 64 L.Ed.2d 702, 100 S.Ct. 2009 (1980).

Congress may enact laws which leave no room for state regulation. Preemption occurs when Congress expresses an unambiguous intent to preempt state regulation; when it implicitly preempts state regulation by the comprehensiveness of its own regulation of an area; when there is a square conflict with federal law; or when the state law is incompatible with federal objectives.[5] On the other hand, Congress may authorize the states to engage in regulation that the Commerce Clause would otherwise forbid.[6]

In the absence of conflicting federal legislation, the states retain a residuum of power to make laws governing matters of legitimate local concern under the police power reserved to them by the Tenth Amendment, even though interstate commerce may be affected, or even, to some extent, regulated. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 6662, 669, 67 L.Ed.2d 580, 101 S.Ct. 1309 (1981); *Lewis v. BT Investment Managers, Inc.*, *supra* at 447 U.S. 36; *Labor & Indus. v. Overnite Transp.*, 67 Wn.App. 24 (1992). *See, South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177,

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[5] *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 530-531, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633, 36 L.Ed.2d 547, 93 S.Ct. 1854 (1973).

[6] *See, e.g., Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769, 89 L.Ed.2d 1915, 65 S.Ct. 1515 (1945); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91, 81 L.Ed.2d 71, 104 S.Ct. 2237 (1984).

185, 82 L.Ed. 734, 58 S.Ct. 510 (1938); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440, 54 L.Ed.2d 664, 98 S.Ct. 787 (1978).

The Supreme Court has consistently held that a state's power to regulate commerce is never greater than in matters traditionally of local concern. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350, 53 L.Ed.2d 383, 97 S.Ct. 2434 (1977); *Kassel v. Consolidated Freightways Corp., supra* at 450 U.S. 670. Regulations that touch upon health, safety, and consumer protection are those that the Court has been most reluctant to invalidate. *Raymond Motor Transportation, Inc. v. Rice, supra*, at 434 U.S. 443; *Kassel v. Consolidated Freightways, supra*, at 450 U.S. 670; *Sproles v. Binford*, 286 U.S. 374, 390, 76 L.Ed. 1167, 52 S.Ct. 581 (1932); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963); *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92, 77 L.Ed. 1053, 53 S.Ct. 577 (1932); *Gardner v. Michigan*, 199 U.S. 325 (1905). Indeed, "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Raymond Motor Transportation, supra*, at 434 U.S. 449 (Blackmun, J., concurring).

The Supreme Court has adopted a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce in favor of local *economic* interests, or when its effect is to favor in-state economic interests over out-of-state interests, the Court has generally applied a *per se* rule of invalidity,

striking down the statute or regulation without further inquiry.[7]

When a state statute does not directly regulate interstate commerce, and the statute promotes legitimate legislative objectives, such as health, consumer protection, or conservation, the Court has engaged in a weighing of the state's local interest against the federal interest in the free flow of interstate trade. It has sought to reconcile the conflicting claims of state and national power by an appraisal and accommodation of the competing demands of the state and national interests involved. The principle the Court applies, as stated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L.Ed.2d 174, 90 S.Ct. 844 (1970) is:

> Where the statute regulates evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v. Detroit, 362 US 440, 443, 4 L Ed 2d 852, 856, 80 S Ct 813, 78 ALR2d 1249. If a legitimate local purpose is

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[7] *See, e.g., Brown-Forman Distillers v. N.Y. Liquor Auth.*, 476 U.S. 573, 90 L. Ed.2d 552, 106 S.Ct. 2080 (1986)(New York statute directly regulated interstate commerce because it effectively regulated the price at which liquor was sold in other states); *Toomer v. Witsell*, 334 U.S. 385, 92 L.Ed. 1460, 68 S.Ct. 1156 (1947) (South Carolina statute required that shrimp boats licensed to fish in South Carolina's waters must unload and pack their catch in that state before transporting it to another state, the purpose being to divert employment and business to South Carolina); *H. P. Hood & Sons, Inc. v. DuMond, supra* (New York statute required a license to engage in an activity for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to protect and advance local economic interests).

> found, the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend upon the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate commerce. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, Southern Pacific Co. v. Arizona, 325 US 761, 89 L Ed 1915, 65 S Ct 1515, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens. See, e.g., Shafer v. Farmers Grain Co., [268 U.S. 189].

In applying the *Pike v. Bruce Church* balancing approach for determining whether a state has overstepped its legitimate role in regulating interstate commerce, the Supreme Court has distinguished between (1) state statutes that burden interstate transactions only incidentally, and (2) those that affirmatively discriminate against ("directly burden") interstate transactions. See discussions in *Hughes v. Oklahoma*, 441 U.S. 322, 336-337, 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979); and *Maine v. Taylor*, 477 U.S. 131, 138, 91 L.Ed.2d 110, 106 S.Ct. 2440 (1986). Statutes in the first group violate the commerce clause only if the burdens they impose on interstate commerce are clearly excessive in relation to the putative local benefits.[8]

Statutes in the second group, those which seek to promote a legitimate state interest by affirmatively discriminating against interstate commerce, are subject to stricter scrutiny. Once the party challenging the validity of

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[8] *E.g., Terminal R. Asso. v. Brotherhood of R. Trainmen*, 318 U.S. 1, 87 L.Ed. 571, 63 S.Ct. 420 (1942), upholding a state safety requirement that freight trains traveling in the state be equipped with cabooses.

the state law shows that the law discriminates against interstate commerce, either on its face or in practical effect, the burden falls on the state to demonstrate both that the statute serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means. A state may not seek to achieve a legitimate goal such as protecting health and safety by the illegitimate means of isolating itself from the national economy.

b. No Federal Preemption

At hearing, Kleenwell argues that Congress, through the Interstate Commerce Act, has impliedly preempted the field of interstate transportation by motor carrier, prohibiting any state regulatory involvement in interstate solid waste transportation. The initial order rejected that argument, finding that Congress has not preempted the field. Kleenwell does not make a preemption argument on review. The Commission finds that the federal government has not preempted the state's regulation of interstate solid waste collection or disposal.

The Interstate Commerce Commission has interpreted its regulatory jurisdiction to exclude the transportation of garbage or refuse across state lines, ruling that garbage is not property within the meaning of 49 USC § 10521.[9] *Joray Trucking Corp. Common Carrier Application*, 99 MCC 109, 110-111 (1965); *Transportation of "Waste" Products for Reuse and Recycling*, 114 MCC 92, 104 (1971).

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[9] Although garbage is not property for purposes of the Interstate Commerce Act, it is commerce for purposes of the Commerce Clause. *Philadelphia v. New Jersey, supra; Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. ___, 119 L.Ed.2d 139, 112 S.Ct. 2019 (1992).

The United States Supreme Court, in *Philadelphia v. New Jersey*, 437 U.S. 617, 620, 57 L.Ed.2d 475, 95 S.Ct. 2531 (1978), at note 4, stated that it found no clear and manifest purpose of Congress to preempt the entire field of interstate waste management or transportation, either by express statutory command, or by implicit legislative design. The court found that "Congress expressly has provided that 'the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . .' 42 USC §6901(a)(4)." Not only has the regulation of the collection and transportation of solid waste has always been within the residuum of power exercised by the states, Congress has expressed a "pervasive congressional concern that state and local authorities attempt to establish comprehensive systems for solid waste disposal and collection." *Parola v. Weinberger*, 848 F.2d 956, 961 (9th Cir. 1988).

c. Chapter 81.77 RCW Does Not Impermissibly Burden Interstate Commerce

Kleenwell argues that Chapter 81.77 RCW and in particular the requirement of a certificate of public convenience and necessity is per se invalid because it is an attempt to effect direct regulation of interstate commerce and because its purpose and effect is economic protection. The Commission rejects that argument.

First, the Commission points out that Kleenwell produced no evidence at all of a discriminatory purpose or effect of Chapter 81.77 RCW. Its entire case has consisted of the *Medigen* decisions, and a challenge to Commission Staff to distinguish *Medigen*. The *Medigen* court's conclusions that a South Carolina statute with a similar certificate requirement "directly" burdened interstate commerce, and that the State of South Carolina failed to

demonstrate that the requirement served a legitimate health and safety interest, do not establish that *Washington's* statute impermissibly burdens interstate commerce. The burden of showing discrimination rests on the party challenging the validity of a statute. *Hughes v. Oklahoma, supra*, at 441 U.S. 336. If Chapter 81.77 is not on its face protectionist or otherwise discriminatory, Kleenwell has not carried its burden of producing evidence, and the state is not required to justify the statute.

However, the Commission will disregard the defects in Kleenwell's presentation for purposes of this discussion. An examination of the provisions of Chapter 81.77 RCW and a review of the evidence in this record clearly show that Chapter 81.77 RCW does not have the purpose or effect of economic protection, that in seeking to achieve health and safety goals the state has not discriminated against interstate commerce, and that the statute promotes a legitimate local interest in protecting the health and safety of the state's residents.

Chapter 81.77 RCW does not attempt to regulate interstate commerce, either directly or indirectly. It directly regulates solid waste collection in local territories within the state. It does not in any way regulate out-of-state transactions.[10]

Chapter 81.77 RCW's only stated purpose relates to health and safety. None of its provisions are facially protectionist; none favor in-state economic interests, and none arbitrarily discriminate against interstate trade for any purpose. Indeed, none of its provisions affirmatively discriminate against ("directly burden") interstate commerce at all. Moreover, Kleenwell did not

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[10] *Compare, Brown-Forman Distillers, supra.*

demonstrate any pro-tectionist or other discriminatory *effects* of Chapter 81.77 RCW. An analysis of the statute reveals none, none are shown in the record, and the Commission is aware of none.

Chapter 81.77 RCW does not permit residents to engage in solid waste collection while prohibiting nonresidents from doing so.[11] Anyone, without regard to citizenship, may apply for and be granted a certificate under chapter 81.77 RCW, on an equal basis. It does not impose restrictions on nonresidents or on out-of-state disposal which are not imposed on residents and in-state disposal. It does not require a nonresident, as a condition of engaging in business, to use certain state resources in pursuit of its business for the benefit of the local economy.[12] It does not place the burden of state regulation disproportionately on interests outside the state.[13] Nowhere in the chapter or in the implementing regulations is there any distinction made between in-state and out-of-state companies or in-state or out-of-state disposal.

Chapter 81.77 RCW does not ban the flow of solid waste across the state's borders.[14] Nor does requiring a certificate of public convenience and necessity have the effect of preventing the free flow of waste across the state's borders. An applicant is not required to designate a disposal site, and any certificated solid waste collection company is free to dispose of the waste it collects either within or without the state unless its application designated an in-state disposal site.

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[11] *Compare, Lewis v. BT Investment Managers, Inc., supra.*

[12] *Compare, Toomer v. Witsell, supra* note 7.

[13] *Compare, Philadelphia v. New Jersey, supra.*

[14] *Compare, Philadelphia v. New Jersey, supra; Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, supra.*

The Commission's granting of a certificate to an in-state company does not forever prevent other companies, in-state or out-of-state, from being granted overlapping authority in the same territory. The franchise granted under Chapter 81.77 RCW is subject to continued satisfactory performance and may be subject to overlapping grants for territories or specialized commodities as to which the existing certificate holder fails to provide satisfactory service. The criteria for judging satisfactory service relate to the company's service within its collection territory and not its citizenship or whether it elects to use in-state disposal sites. The collection of specialized commodities may be subject to overlapping grants even if the existing certificate holders are providing satisfactory service, if the public interest will be served thereby.

Regulation under the act is evenhanded, as demonstrated by the fact that three out-of-state companies have certificates to operate as solid waste collection companies in designated service territories in the state. One of the intervenors in this Case, American Waste Systems, is a California corporation to whom the Commission has granted statewide authority to collect infectious or medical waste; it disposes of the waste in California.

Chapter 81.77 RCW does not have the effect of making it more expensive for an out-of state [sic] firm to provide collection services in the state than it is for an in-state firm. It does not have the effect of forcing an out-of-state firm to alter its operating practices to the benefit of in-state firms.[15] It does not have the effect of requiring a

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[15] *Compare, Hunt v. Washington State Apple Advertising Comm'n, supra.*

nonresident business, in order to engage in business in the state, to construct unnecessary facilities.[16]

In support of its argument, Kleenwell relies on *Buck v. Kuykendall*, 267 U.S. 307, 69 L.Ed. 623, 45 S.Ct. 324 (1925) and *George W. Bush & Sons v. Maloy*, 267 U.S. 317, 69 L.Ed. 627, 45 S.Ct. 326 (1925), which held that a state may not require a certificate of convenience and necessity from a carrier (bus company) engaged exclusively in interstate commerce before it can operate within the state's borders. Those cases do not stand for the proposition that a carrier who crosses a state line is entitled to use state highways as a matter of right. *Bradley v. Public Utilities Commission of Ohio*, *supra*, 289 U.S. at 95. The problem with the state action in *Buck* and *Bush* was that it invaded a field, the adequacy of interstate transportation facilities, of peculiarly federal concern; a single state sought to control competition in an area of commerce that is inherently of concern to more than one state.[17] The primary purpose of regulation in those cases was the prevention of competition deemed undesirable; the promotion of safety was merely incidental. Under chapter 81.77 we are concerned with the adequacy of solid waste collection service - a test strictly related to local concerns. The state does not regulate the means of interstate commerce, but rather regulates the in-state aspects of collection service which are central to the health, safety, and welfare of the state's citizens.

If this state's requirement of a certificate of public convenience and necessity is not protectionist, and does not

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[16] *Compare, Pike v. Bruce Church, Inc., supra.*

[17] The number of carriers who are permitted to transport goods or persons interstate is of concern to more than one state, and one state's regulation may impinge upon another's interests. This is not true of local waste collection service.

affirmatively discriminate against interstate commerce, any burden it places on interstate commerce can at most be an indirect or incidental burden. *If* there is a burden, the statute is not subject to strict scrutiny under the *Pike v. Bruce Church* balancing approach, and should be upheld unless the burdens it imposes on interstate commerce are clearly excessive in relation to the putative benefits.

However, the Commission does not believe that the requirement of a certificate of public convenience and necessity burdens interstate commerce at all. The only effect that this nondiscriminatory restriction on who may collect waste has on commerce is to prevent free entry and unrestricted competition; only a few companies are able to gain access to the waste collection markets. Limiting, in a non-discriminatory manner, the number of persons who can engage in local waste collection does not burden interstate commerce. It does not interfere with the national interest in keeping interstate commerce free from interferences that seriously impede it, and does not isolate the state from the national economy. The Commerce Clause does not create a right in a particular company to engage in whatever activity it chooses in a state, merely because its activity would somehow involve interstate movement. The Commerce Clause does not create a right in a particular company to engage in whatever activity it chooses in a state, merely because its activity would somehow involve interstate movement. The Commerce Clause protects out-of-state firms from discrimination, and protects interstate markets; it does not protect particular interstate firms from even-handed restrictions on particular local activities. *See*, *Sporhase v. Nebrask ex rel. Douglas*, 458 U.S. 941, 73 L.Ed.2d 1254, 102 S.Ct. 3456 (1982); *Bradley v. Public Utilities Commission of Ohio*, *supra*, at 289 U.S. 95; *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 57 L.Ed.2d 91, 98 S.Ct. 2207 (1978);

Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 474, 66 L.Ed.2d 659, 101 S.Ct. 715 (1981).

Thus, the possibility that Kleenwell would not be permitted to collect waste in a particular territory in Washington, either because it might not establish need for another collection company or because of the previous determination of its unfitness, does not support its claim that application of Chapter 81.77 RCW to its activities impermissibly burdens interstate commerce.

d. Chapter 81.77 RCW Promotes Legitimate State Concerns

The Commission rejects Kleenwell's contention that Chapter 81.77 RCW has nothing whatever to do with health or safety or any other legitimate local concern.

[5] The purpose of Chapter 81.77 RCW is "to protect public health and safety and to ensure solid waste collection services are provided to all areas of the state." RCW 81.77.100. Few matters are of greater local concern to a community than the reliable removal of solid waste, including medical waste, from all parts of the community. It is also a legitimate concern of the state that universal collection service be available to all communities as well as all rural areas through the state.

That the transportation of solid waste for collection or disposal is a legitimate local concern involving the protection of the public health, safety and welfare, and subject to the state's police power, is well settled. *Smith v. Spokane*, 55 Wash. 219, 220-21, 104 Pac. 249 (1909); *City Sanitary Service v. Rausch*, 10 Wn.2d 446, 448-49, 117 P.2d 225 (1958); *Spokane v. Carlson*, 73 Wn.2d 76, 436 P.2d 454 (1968). There are numerous reported cases upholding the authority of local governments to

monopolize and regulate local garbage collection by eliminating or controlling competition among carriers. Annotation, *Regulation and Licensing of Private Garbage or Rubbish Removal Services*, 83 ALR 2d 799; *Smith v. Spokane*, *supra*, 55 Wash. at 221-22. The statutory scheme is not unique to chapter 81.77 RCW. What chapter 81.77 RCW does is provide for regulation of solid waste collection in unincorporated areas of the state, and in the cities and towns which have not undertaken to regulate that service themselves.

Kleenwell agreed at hearing that medical waste is a dangerous commodity and that risk of danger ought to be reduced. On review it takes the position that the waste it transports is not dangerous in the waste stream after it leaves the generating source because it is properly containerized. Wayne Turnberg of the Washington Department of Ecology, a medical waste expert and author of a 1989 statewide study of infectious waste management, testified that it is possible for disease transmission to occur from medical waste in the waste stream after it leaves the generating source. The uncontradicted testimony in this record establishes the potential risk of harm posed by medical waste in the solid waste stream. The risks to public health were also detailed in the hearings on Kleenwell's 1990 application for authority. Even if it may be possible to handle particular waste without harm to the public, it may be subject to regulation when a uniform system of collecting and disposing of waste is necessary to protect the public from danger. *Spokane v. Carlson*, *supra*, 73 Wn.2d at 81-82.

A separate and very real danger is that medical waste will not be properly containerized and will not get into the waste stream at all if universal collection at reasonable, nondiscriminatory rates is not assured. In *Evergreen Waste Systems, Inc.*, Cause No. TG-1911 (May

1986), witnesses described the problems a locality encounters when collection service is spotty or too expensive. Generators or shippers of waste who are unable to get service, or who are offered service only at prohibitive rates, take matters into their own hands, disposing of waste indiscriminately, with attendant health and environmental problems. The Commission's experience has been that when the price charged for any waste collection increases to a level that the public perceives to be unreasonable, improper disposal increases. The state clearly has a legitimate interest in discouraging improper disposal.

The Legislature has chosen the certificate of public convenience and necessity as the best mechanism to meet the health and safety concerns of solid waste collection in areas that are not regulated by incorporated cities. Requiring a certificate allows the state to accomplish universal waste collection without discrimination. RCW 81.28.010.[18] Rate regulation provides rates that are just, fair and reasonable and that do not discriminate among customers or provide unreasonable preferences. RCW 81.28.010, 81.28.180, and 81.28.190. Customers in rural areas are served at the same rates as customers in densely populated areas. Sudden discontinuance of service is avoided. Chapter 81.77 RCW also assures that market entrants are fit. Once a certificate is granted, safe and adequate operations are assured by the possibility of penalties, certificate revocation, or the grant of competing authority within the service territory. RCW 81.77.030; 81.77.040; 81.77.090.

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[18] A certificate holder is a public service company, and as such is required to provide universal service without discrimination. RCW 81.77.070; 81.28.020; 81.28.180.

In the absence of a rational system of regulation, the state's legitimate goals cannot be achieved. In an atmosphere of free and open competition, service will not be adequate, secure, reliable, or fair. The Commission's experience in prior cases supports this conclusion. The experiences in *Evergreen Waste Systems* and *All County Disposal* were that when an unregulated company comes into a territory served by a regulated collection company, the unregulated company engages in practices such as providing service in more densely populated areas and refusing service to outlying areas; soliciting new customers at lower rates than the regulated company, which has to serve the entire territory, can offer; charging special rates to preferred customers; and abandoning customers in order to take on new customers. The cream-skimming in urban areas diminishes the ability of certificated companies to continue subsidizing service to rural areas. In order to survive, regulated companies must raise their rates, which makes them vulnerable to further cream skimming. Regulated carriers cannot long survive in such an environment.

Intervenors Sure-Way Medical Services, Inc. and American Environmental Management Corporation, both certificated waste collection companies, related similar experiences in the market that Kleenwell has targeted. Kleenwell selects customers based on the needs of its related medical supplies company. It presently subsidizes the collection service, enabling it to undercut the rates the certificated collection companies charge. It serves only the state's most populous area. Both certificated collection companies are losing accounts to Kleenwell, at an accelerating rate, in their most profitable market. The record establishes that Kleenwell's operations detrimentally impact universal service by existing biomedical waste collection companies. If a waste collector can escape state regulation by the simple expediency of disposing of the

waste out of state, the regulatory scheme embodied in chapter 81.77 RCW cannot succeed.

The conclusion that the state's system of rational regulation is the best means to achieve the state's goals is further supported by the testimony of Professor Paul S. Dempsey, an internationally recognized expert in the area of transportation regulation. Professor Dempsey discussed in great detail the substantial danger to smaller communities and rural communities inherent in moving away from a regulatory scheme such as the one adopted in Washington. One particular portion of Professor Dempsey's testimony puts the value of the state's statutory scheme in perspective:

> Q. Professor Dempsey, can a regulatory scheme such as Washington has for the collection of solid waste, including infectious waste, succeed in providing universal service to both urban and rural areas at non-discriminatory rates if some of the entrants in that market are regulated a [sic] to rates, service, safety and others are not?
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> A. No, it certainly cannot succeed if there are two groups of carriers; one which are [sic] regulated and one which are [sic] not. The unregulated group will engage in cream-skimming. They will go for the most lucrative traffic depriving the established carriers, who are, by the way left with a common carrier responsibility to provide their entire service territories with just and reasonable rates, with the freight that is easiest to pick up; the freight that is less costly to transport, the

freight that has a higher profit margin. It will obliterate really the ability of the regulated group to continue to provide that service. What you will likely see over time is that the regulated group will themselves either go out of business, or try to become part of the unregulated group because they have - you know, they have to make a profit in order to survive. They're owned by private investors, and they can't - their ability to make a profit in a deregulated scheme is going to be significantly impeded.

Q. Does the Washington regulatory scheme, in your opinion, promote non-discriminatory pricing in the provision of waste collection service?

A. Yes, it does so explicitly. It requires that all rates charged shall be non-discriminatory; that they shall be just and reasonable. It imposes a common carrier obligation that carriers provide service throughout their service territories, and it regulates the safety of those companies providing this service.

When asked if it is possible to meet a statewide need for reasonably priced solid waste collection service, including biomedical waste, by allowing free market entry without any type of rate regulation, Professor Dempsey responded:

> No, it isn't. If you have no regulation at all, you would have a highly discriminatory pricing system. The

> service would be spotty. The economic condition of the industry would be weak, and the economic forces driving the disposal of waste in entirely the wrong direction for purposes of public health and safety would be stronger.

In sum, this state has chosen the certification requirement as the means of assuring universal solid waste collection service at rates that are reasonable. The Commission has found it to be an effective means of achieving the state's purposes. There are no obvious alternatives that would achieve the same result. A state is not required to develop new and unproven means of protection at an uncertain cost just to demonstrate that it is making a reasonable effort to avoid restraining the free flow of commerce. *Maine v. Taylor*, *supra*, 477 U.S. at 147. The Commerce Clause does not elevate free trade above all other values. *Id.* 477 U.S. at 151; *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92, 95, 77 L.Ed. 1053, 53 S.Ct. 577 (1932).

e. The Commission Adheres to Its Decision in All County Disposal and Evergreen Waste Systems

The only new development in the law since *All County Disposal* and *Evergreen Waste Systems* is the *Medigen* case upon which Kleenwell relies. The *Medigen* decisions do not require the Commission to arrive at a result in this case that is different from its previous decisions.

Medigen dealt with a different statutory scheme, and a different Commission's interpretation of its authority. *Medigen* also is factually distinguishable. *Medigen* did not involve an intrastate movement prior to the shipment out of state; the parties stipulated that neither company engaged

in the intrastate transportation of medical waste from one point in West Virginia to another point in West Virginia. Another distinction is that the State of West Virginia apparently failed to demonstrate persuasively that the requirement of a certificate served a legitimate public health and safety interest. A final distinction is that the plaintiffs in *Medigen* had not previously been found unfit to provide medical waste collection. The expert testimony in the present proceeding establishes the legitimate state interest, and the testimony and the Commission's experience in other solid waste proceedings establishes the connection between the interest and the certificate requirement.

This Commission also has the benefit of extensive previous experience with medical waste issues which a reviewing court may lack. *See*, Order M. V. G. No. 1452, *In re American Environmental Management Corp.*, App. No. GA-874 (November 1990) and Order M. V. G. No. 1451, *In re Sure-way Incineration, Inc., In re Sure-way Incineration, Inc.*, App. No. GA-868 (November 1990); and Exhibit 13 in this case (the initial decision denying Kleenwell's 1990 application for authority.)

The Commission also believes that the *Medigen* court's analysis was not thorough and that the case was wrongly decided under the pertinent U.S. Supreme Court precedent, is contrary to the weight of authority, and is not binding on courts in Washington State. The *Medigen* court failed to recognize that solid waste collection is a particularly local concern, and that any interstate transportation of collected waste is merely incidental to the collection. The decision goes against long-standing and overwhelming precedent which recognizes that regulation of the collection and transportation of solid waste is especially within the states' residuum of power under the Commerce Clause. The decision improperly *assures* that

any requirement which prevents free access and open competition by a company which engages in interstate transportation is a "direct regulation" of interstate commerce. Its analysis equates "direct regulation" with "direct burden," applying the *Pike v. Bruce Church* stricter scrutiny alternative to "defendants' direct regulation." It appears to assume an unconditional right of interstate firms to freely compete in any market, and loses sight of the proper focus of a Commerce Clause analysis - that we have a single national economy, and that what is impermissible is state action which unjustifiably isolates the state from the national economy.

IV CONCLUSION

Kleenwell's operations are subject to Commission regulation under Chapter 81.77 RCW. Its activities are defined by Washington statute as the common carrier activities of solid waste collection companies. Kleenwell is engaging in purely intrastate activity in collecting waste and in the transportation for collection; the collection of solid waste is a peculiarly local service.

Chapter 81.77 RCW does not favor in-state economic interests, or affirmatively discriminate against ("directly burden") interstate commerce. Rather, it prevents the uncontrolled collection of waste by restrictions which are applied evenhandedly and without regard to citizenship or whether the waste is removed from the state. If subjecting Kleenwell's operations to regulation under Chapter 81.77 RCW in any way affects interstate commerce, the effect is minimal and is wholly incidental to the operation of the statute in protecting legitimate state interests.

Kleenwell's petition for administrative review should be denied. The initial order directing Kleenwell to

cease and desist its waste collection operations should be affirmed. Kleenwell should be declared to be engaging in operations without having obtained requisite authority; and the company should be declared to be subject to Commission jurisdiction.

Based upon the entire record and the file in this proceeding, the Commission makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On April 8, 1992, the Commission served a complaint, order, and notice of hearing initiating this classification proceeding pursuant to RCW 81.04.110 and 81.04.510. The issue to be determined is whether Kleenwell Biohazard Waste and General Ecology Consultants, Incorporated ("Kleenwell"), is in the business of transporting solid waste for collection and/or disposal for compensation over the public highways of the state without certificate authority required by RCW 81.77.040.

2. Kleenwell operates a medical waste collection business in the greater Seattle area in the state of Washington. The business is a Washington corporation and its sole shareholders and employees are Mr. Rowland and his daughter; both are Washington residents. Mr. Rowland operated his business as a sole proprietorship prior to incorporating in August 1990. The company provides a medical waste collection and disposal service for doctors and dentists. Mr. Rowland also operates a medical supply company, and most of Kleenwell's customers are customers of that company. The waste collection and disposal service does not make a profit, and is subsidized by the medical supply company.

3. Kleenwell collects medical waste from the generators on a weekly basis and supplies its customers with disposal containers and instructions on the proper handling of medical waste. Kleenwell transports the waste to a warehouse in Des Moines, near Seattle, where the waste is held in cold storage for up to 90 days until the Rowlands load it into a truck and transport it to California for disposal by incineration.

4. All of the waste that Kleenwell collects and stores is eventually disposed of in California. The decision to transport the waste to California is Mr. Rowland's alone. None of Kleenwell's customers has requested out-of-state disposal, and Mr. Rowland would refuse a request for in-state disposal.

5. Enoch Rowland and Wayne Turnberg testified about the risks to the public posed by medical wastes. Mr. Turnberg is an Environmental Planner in the Solid Waste Support Section of the Washington State Department of Ecology, and was project director and author of a 1989 statewide study on infectious waste management. Medical waste in the waste stream poses significant public health risk. Precautions must be taken in handling medical waste which are not required with solid waste generally. Once medical waste leaves the waste generator's premises, the only statewide regulations that apply to its transportation are those promulgated by the Commission.

6. Medical waste in the solid waste stream poses a risk of serious harm to the health and safety of the general public and must be carefully and properly handled. A uniform system of collecting and disposing of waste is necessary to protect the public from danger.

7. Professor Paul Dempsey, professor of law and director of the transportation law program at the University of Denver College of Law, testified about the impact of unregulated entry into the field of solid waste collection. Unregulated entry would cause unfair and discriminatory pricing and a lack of service in areas of the state, and would result in improper disposal of infectious waste.

8. Weldon Burton testified about the effects of unregulated competition on certificated solid waste collection companies in Clark County. An unregulated collector, Evergreen Waste Systems, engaged in cream-skimming, which enabled it to provide service at lower rates than the regulated companies. The regulated companies lost customers to Evergreen in the most densely populated areas of the county, especially along the major arterials; these were their most profitable accounts. Evergreen chose the customers it wanted to serve and dropped customers in favor of new customers when it was expedient to do so. The regulated companies suffered a loss in revenue which put them in the position of having to seek increases in rates in order to cover fixed costs.

9. Stan Robinson testified on behalf of intervenor Rabanco Companies' Sure-Way Medical Services operation. Jeff Daub testified on behalf of intervenor American Environmental Management Corporation. Both companies are regulated collectors of medical waste. Both companies collect medical waste in King County. American Environmental disposes of the waste it collects in California. American Environmental serves not only King County but rural and remote areas of the state. All of American Environmental's customers are served at same rate; its urban accounts subsidize the rural service. Both companies are losing accounts to Kleenwell in King County, and the rate of loss is accelerating. American

Environmental has contingency plans to reduce its equipment and personnel committed to this state if unregulated operations such as Kleenwell's are allowed. Kleenwell's operations detrimentally impact universal service by existing biomedical waste collection companies.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this proceeding.

2. The respondent is operating as a solid waste collection company within the state of Washington as defined in RCW 81.77.010 and is required by RCW 81.77.040 to have a certificate of public convenience and necessity to conduct waste collection operations. The fact that the respondent ultimately transports the solid waste it collects out of the state for disposal does not affect this conclusion. The collection of solid waste is a local function of singularly local concern; the transportation of collected waste for disposal is incidental to the collection process.

3. The respondent's collection activities and its transportation of solid waste from waste generators' premises to an in-state warehouse is wholly intrastate activity.

4. The provisions of Chapter 81.77 RCW, including the requirement of a certificate of public convenience and necessity, can be applied to respondent's operations without violating the Commerce Clause of the United States Constitution.

5. The respondent should be ordered to cease and desist transporting solid waste for collection and/or

disposal until it obtains a certificate from the Commission authorizing such operations.

ORDER

THE COMMISSION ORDERS That the petition for administrative review of Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, is denied;

THE COMMISSION FURTHER ORDERS That Enoch Rowland and Kleenwell Biohazard Waste and General Ecology Consultants, Incorporated, are directed to cease and desist from operating motor vehicles for the collection and/or transportation of solid waste for compensation over the public highways of the State of Washington.

DATED at Olympia, Washington, and effective this 22d day of January 1993.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

s/ Sharon L. Nelson
SHARON L. NELSON, Chairman

s/ Richard D. Casad
RICHARD D. CASAD, Commissioner

s/ A. J. Pardini
A. J. PARDINI, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition

for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

APPENDIX C

81.77.040 **Certificate of conveniences and necessity required--Procedure when applicant requests certificate for existing service area.** No solid waste collection company shall hereafter operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. A condition of operating a solid waste company in the unincorporated areas of a county shall be complying with the solid waste management plan prepared under chapter 70.95 RCW applicable in the company's franchise area.

Issuance of the certificate of necessity shall be determined upon, but not limited to, the following factors: The present service and the cost thereof for the contemplated area to be served; an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal sworn to before a notary public; a statement of the assets on hand of the person, firm, association or corporation which will be expended on the purported plant for solid waste collection and disposal, sworn to before a notary public; a statement of prior experience, if any, in such field by the petitioner, sworn to before a notary public; and sentiment in the community contemplated to be served as to the necessity for such a service.

Except as provided in *RCW 81.77.150, when an applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, the commission may, after hearing, issue the certificate

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* Reviser's note: RCW 81.77.150 expired June 30, 1991.

only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission.

In all other cases, the commission may, with or without hearing, issue certificates, or for good cause shown refuse to issue them, or issue them for the partial exercise of the rights granted such terms and conditions as, in its judgment, the public convenience and necessity may require.

Any right, privilege, certificate held, owned, or obtained by a solid waste collection company may be sold, assigned, leased, transferred, or inherited as other property, but only upon authorization by the commission.

Any solid waste collection company which upon July 1, 1961 is operating under authority of a common carrier or contract carrier permit issued under the provisions of chapter 81.80 RCW shall be granted a certificate of necessity without hearing upon compliance with the provisions of this chapter. Such solid waste collection company which has paid the plate fee and gross weight fees required by chapter 81.80 RCW for the year 1961 shall not be required to pay additional like fees under the provisions of this chapter for the remainder of such year.

For purposes of issuing certificates under this chapter, the commission may adopt categories of solid wastes as follows: Garbage, refuse, recyclable materials, and demolition debris. A certificate may be issued for one or more categories of solid waste. Certificates issued on or before July 23, 1989, shall not be expanded or restricted by operation of this chapter. [1989 c 431 § 21; 1987 c 239 § 2; 1961 c 295 § 5.]

81.04.510 Engaging in business or operating without approval or authority - Whether or not any person or corporation is conducting business requiring operating authority, or has performed or is performing any act requiring approval of the commission without securing such approval, shall be a question of fact to be determined by the commission. Whenever the commission believes that any person or corporation is engaged in operations without the necessary approval or authority required by any provision of this title, it may institute a special proceeding requiring such person or corporation to appear before the commission at a location convenient for witnesses and the production of evidence and bring with him books, records, accounts, and other memoranda, and give testimony under oath as to his operations or acts, and the burden shall rest upon such person or corporation of proving that his operations or acts are not subject to the provisions of this chapter. The commission may consider any and all facts that may indicate the true nature and extent of the operations or act and may subpoena such witnesses and documents as it deems necessary.

After having made the investigation herein described, the commission is authorized and directed to issue the necessary order or orders declaring the operations or acts to be subject to, or not subject to, the provisions of this title. In the event the operations or acts are found to be subject to the provisions of this title, the commission is authorized and directed to issue cease and desist orders to all parties involved in the operations or acts.

In proceedings under this section no person or corporation shall be excused from testifying or from producing any book, waybill, document, paper or account

before the commission when ordered to do so, on the ground that the testimony or evidence, book, waybill, document, paper or account required of him may tend to incriminate him or subject him to penalty or forfeiture; but no person or corporation shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any account, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence in proceedings under this section: PROVIDED, That no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. [1973 c 115 § 15.]

81.04.110 Complaint - Hearing. Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.

When two or more public service corporations, (meaning to exclude municipal and other public corporations) are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which trhe complainant is in competition, are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon its own motion, the commission shall have the power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent opression or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates,

charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.

All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder or complaints or grievances or misjoinder of parties; and in any review of the counts of orders of the commission the same rule shall apply and pertain with regard to the joiner of compaints and parties as herein provided: PROVIDED, All grievances to be inquired into shall be plainly set forth in the complaint. No complaint shall be dismissed because of the absence of direct damage to the complaint.

Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting as herein provided. Rules of practice and procedure not other provided for in this title may be prescribed by the commission. [1961 c. 14 § 81.04.110. Prior: 1913 c. 145 § 1; 1911 c 117 § 80; RRS § 10422.]

(2)

Supreme Court, U.S.
FILED
MAY 31 1995
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No. 94-1757

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

KLEENWELL BIOHAZARD WASTE AND GENERAL ECOLOGY CONSULTANTS, INCORPORATED,

Petitioner,

v.

SHARON NELSON, Chairman, et al.,

Respondents.

On Petition for a Writ of Certiorari From the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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May 1995

24pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state may require a certificate for a solid waste collection company to provide a local waste collection service where the certification requirement provides no preference to in-state collection companies, affects interstate commerce only incidentally, and where the burden imposed on that commerce is not excessive.

2. Whether in a federal civil rights action a state administrative agency's fact findings are entitled to the same preclusive effect they would be given in the state courts, where the state agency acted in its judicial capacity to resolve those factual issues which were properly before it, and where the parties had an adequate opportunity to litigate those issues.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts regarding the operations of Kleenwell Biohazard Waste and General Ecology Consultants, Incorporated (Kleenwell), were presented in hearings before an administrative law judge in state administrative proceedings in May and June of 1992. The order which the Washington Utilities and Transportation Commission (WUTC) entered following those hearings is set forth in the appendix to Kleenwell's petition. Pet. App. 26(a)-68(a).

Kleenwell is a Washington corporation with all of its facilities located in that state. Kleenwell's two shareholders are

both Washington State residents. No out-of-state interests are involved in this case. Kleenwell operates a medical waste collection and disposal service in the greater King county area. Medical waste is collected from customers weekly and transported to a rented warehouse in Washington where it remains for up to 90 days until a load is hauled to California.

At one time, Kleenwell held a temporary certificate from the WUTC to operate as a solid waste collection company.[1] While operating under that temporary authority, Kleenwell used a disposal site in Ferndale, Washington.

After notice and hearing, Kleenwell's temporary authority was cancelled and its application for permanent authority denied. Kleenwell, nevertheless, continued to provide the same service in the same manner except that it began transporting the medical waste it collected to California.

The denial of Kleenwell's application was not based on a determination of whether there was a need for the proposed service. The application was denied because Kleenwell was found unfit to provide waste collection service for, among other reasons, knowingly violating health regulations regarding the storage of medical waste. Pet. App. 33(a).

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[1]Under Washington law, no company can lawfully operate as a solid waste collection company without first obtaining a certificate of public convenience and necessity from the WUTC. Wash. Rev. Code § 81.77.040; Pet. App. 69(a)-70(a).

At the time Kleenwell began transporting waste to California, the in-state disposal site was still accepting medical waste from Kleenwell. The only reason Kleenwell changed to the out-of-state disposal site was to try to avoid state regulation once its permanent application had been denied.

It is between two and three times as expensive to dispose of medical waste at the California facility than at Ferndale. There is nothing different in the handling and disposal of medical waste at the California facility that would justify the change in disposal sites.

The decision to dispose out-of-state was Kleenwell's alone. Kleenwell's customers were indifferent whether their medical waste was disposed in-state or out-of-state. No customers ever requested that their medical waste be disposed in California, and none objected to the disposal at Ferndale.

In January 1992, the WUTC imposed $6,000 in penalty assessments against Kleenwell for operating as a solid waste collection company in Washington State without a certificate to do so. Kleenwell asserted that the penalty assessment was invalid because the transportation in question was interstate in nature.

After the assessment of the penalty, the WUTC initiated an administrative proceeding by complaint to enforce the state certification requirements. In that proceeding, Kleenwell again

contended that it was not subject to the certification requirement because it was engaged in interstate commerce. The hearing was conducted in accordance with the state Administrative Procedure Act (APA) for adjudicative proceedings (Wash. Rev. Code § 34.05.410-.476) and the WUTC's rules of practice and procedure (Wash. Admin. Code Chapter 480-09). The hearing was presided over by an administrative law judge from the state Office of Administrative Hearings. Proper notice of the hearing was provided to Kleenwell. Motions to intervene were granted to five interested parties. All parties were represented by counsel. Kleenwell's counsel made an opening statement. Direct testimony under oath was presented and cross examined. Evidentiary objections were made and ruled upon. Exhibits were admitted into evidence. Opening briefs were filed by all parties and Kleenwell filed a reply brief. The administrative law judge issued an initial order. Kleenwell filed a petition for administrative review of the proposed order. The WUTC then entered its final order affirming the decision of the administrative law judge.

In its order, the WUTC determined that Kleenwell was operating as a "solid waste collection company" as defined by Wash. Rev. Code § 81.77.010(7) and was subject to the certification requirements of Wash. Rev. Code § 81.77.040. The WUTC considered Kleenwell's claim that it was immune

from state regulation under the Commerce Clause. Kleenwell never appealed the WUTC's decision in state court as provided by the state APA, but rather filed a complaint under 42 U.S.C. § 1983 in federal district court.

On September 10, 1993, the federal district court granted the commissioners of the WUTC their motion for summary judgment. Kleenwell appealed to the Ninth Circuit Court of Appeals which on February 9, 1995, affirmed the decision of the district court. *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391 (9th Cir. 1995); Pet. App. 1(a).

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioner Mischaracterizes the Purpose and Effect of the Washington Statute.

Kleenwell mischaracterizes the Washington statute as a restriction on the interstate transportation of waste. The Washington statute, neither in purpose nor in effect, impedes the interstate transportation of waste.

The statute directly regulates a local activity — solid waste collection in the state of Washington. Nothing in the statute dictates in any way where a certificated hauler transports waste for ultimate disposal. Nothing in this statute prevents the free flow of waste into or out of Washington State. Nothing in the statute favors in-state interests over out-of-state interests in

the certification process; companies based outside the state have the same rights to certification as those based inside the state.

Kleenwell's characterization of the Washington statutory framework as an obstruction to the interstate movement of waste is without basis in law or fact.

2. The Decision of the Court of Appeals Does Not Conflict With the Commerce Clause Decisions of This Court.

The Ninth Circuit Court of Appeals correctly decided that on the facts before it the Commerce Clause does not prevent the State of Washington from imposing its certification requirement on Kleenwell. There is no inconsistency between that decision and prior decisions of this Court.

A. The Decision of the Court of Appeals Does Not Conflict With *Buck v. Kuykendall*.

In attempting to find some inconsistency, Kleenwell relies on *Buck v. Kuykendall*, 267 U.S. 307 (1925) for the proposition that there is a per se rule against certification requirements such as Washington State's. As noted by the Court of Appeals, however, there are at least three cases of this Court upholding the constitutionality of state regulations requiring businesses engaged in interstate commerce to obtain state permits

prior to doing so.[2] *Kleenwell*, 48 F.3d at 396; Pet. App. 13(a)-15(a). *Buck v. Kuykendall* does not stand for the proposition that a carrier who crosses a state line is entitled to use state highways as a matter of right. *Bradley v. Public Util. Comm'n of Ohio*, 289 U.S. 92, 95 (1932).

Rather, the problem with the state action in *Buck* was summarized in the companion case of *Bush & Sons Co. v. Maloy*, 267 U.S. 317, 326 (1925):

> The state action in the Buck case was held to be unconstitutional . . . because the statute, as construed and applied, invaded a field reserved by the commerce clause for federal regulation.

Bush, 267 U.S. at 324-25. The field of solid waste collection, by contrast, is not a field reserved for federal regulation. The field of solid waste collection has been primarily reserved by Congress for local regulation:

> The Congress finds with respect to solid waste—
>
> . . . .
>
> (4) that . . . the collection and disposal of solid wastes should continue to be primarily the function of State, Regional and local agencies . . . .

42 U.S.C. § 6901(a)(4) (The Solid Waste Disposal Act).

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[2] *TV Pix, Inc. v. Taylor*, 396 U.S. 556 (1970) (per curium); *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961); *Bradley v. Public Util. Comm'n of Ohio*, 289 U.S. 92 (1933).

The infirmity in the statute in *Buck* was that its purpose was to prevent competition deemed undesirable, and the test employed was the adequacy of existing transportation facilities for conducting interstate commerce "a test peculiarly within the province of federal action." *Bradley v. Public Util. Comm'n of Ohio*, 289 U.S. 92, 95 (1932). Under the Washington statute, the WUTC is not concerned with the adequacy of transportation facilities for conducting interstate commerce. It is concerned with the adequacy of solid waste collection service—a test strictly related to local concerns.[3]

The vice in the statute in *Buck* was control of interstate commerce. This was demonstrated by the fact that Oregon had already issued a certificate of necessity for the interstate passenger route between Seattle and Portland on the finding that Oregon citizens would benefit from the service. Consequently, Washington's denial of a certificate affected not only its own citizens, but also those of Oregon, as well as citizens of other states who may have been traveling between the two cities. Here, the citizens of other states have no interest in the area of

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[3]The Court of Appeals noted that *Buck* turned upon the fact that the central purpose of the regulation was to regulate commerce. The primary purpose of Washington's regulation is to address a legitimate local concern with only incidental effects on interstate commerce. *Kleenwell*, 48 F.3d at 396; Pet. App. 1(a).

solid waste collection governed by the Washington statute.[4] *Buck* has no application here.

B. The Decision of the Court of Appeals Does Not Conflict With *C & A Carbone, Inc. v. Town of Clarkstown.*

There is likewise nothing inconsistent between the Court of Appeals' decision and the decision of this Court in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. ___, 114 S. Ct. 1677, 128 L. Ed. 2d. 399 (1994). Kleenwell states that *Carbone* is one of a series of decisions, the theme of which is that a state cannot restrict the flow of waste into or out of the state. Even accepting that characterization, there is nothing in the Washington statutes that prevents the free flow of waste across any state line or grants any preference to any in-state interests over out-of-state interests.

In *Carbone*, this Court found that the town of Clarkstown's flow control ordinance discriminated against interstate commerce in two ways. First, the Carbone processing facility received and processed waste from outside the town, including waste coming from out of state. Under the flow control ordinance, Carbone was required to send the

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[4]Kleenwell incorrectly argues that this case involves the same state law that was found invalid in *Buck v. Kuykendall*. *Buck* involved chapter 81.68 of the Revised Code of Washington relating to "auto transportation companies". *Kleenwell* involves chapter 81.77 (Wash. Rev. Code) relating to solid waste collection companies.

nonrecyclable portion of this out-of-state waste to the town's transfer station. This requirement drove up the cost for out-of-state interests to dispose of their solid waste.

Second, insofar as the ordinance applied to waste originating in Clarkstown, the ordinance prevented everyone except the single local operator from performing the initial processing step. Consequently, the court found that the ordinance deprived out-of-state businesses of access to a local market. *Carbone*, 114 S. Ct. at 1681.

The two reasons the Court found the town's ordinance to discriminate against interstate commerce are not present in the Washington statutory framework for solid waste collection as applied to *Kleenwell*.[5] Chapter 81.77 of the Revised Code of Washington (Wash. Rev. Code) does not drive up the costs for out-of-state interests, to dispose of solid waste or otherwise. No waste originating outside of the state of Washington is affected by the Washington statute.

Moreover, the Washington statute does not require that the collection service be performed by a local provider. Out-of-state businesses do provide collection services in the state of

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[5]The Clarkstown ordinance also generated revenue for the town since it was a financing measure. *Carbone*, 114 S. Ct. at 1684. Rates for certificated haulers are regulated to assure that they are fair, just, and reasonable, however, revenue generation for the state is not a feature of the Washington statute.

Washington. In the case of medical waste in particular, the WUTC granted statewide collection authority to American Waste Systems, a California corporation, which uses a California disposal site.[6] Pet. App. 65(a). Nor does the Washington statute impose any local processing requirement. When this Court focused on the processing and disposal service as the commerce in *Carbone*, the Court concluded that the flow control ordinance discriminated against out-of-state interests because it allowed only the favored local operator to process waste within the town limits:

> In this light, the flow control ordinance is just one more instance of local processing requirements that we long have held invalid. [Citations omitted.] . . . The essential vice in laws of this sort is that they bar the import of the processing service . . . Out-of-state [processors] . . . are deprived of access to local demand for their services.

Carbone, 114 S. Ct. at 1682.

Kleenwell is not importing a collection service from out of state. Kleenwell is a Washington corporation with all its facilities in the state. Thus, we are not here concerned with the importation of a service as an article of commerce as in *Carbone*. But more important, as noted above, out-of-state

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[6]Since American Waste System's certificate to collect medical waste covers the entire state, that authority overlaps every other service territory in the state. Thus, every service territory has at a minimum two carriers authorized to collect medical waste, at least one of which is an out-of-state business.

waste collection businesses are allowed to operate in the state of Washington whether they dispose waste within or outside the state.

3. The Decision of the Court of Appeals is Not in Conflict With the Decision of Another Circuit.

Kleenwell's claim that the decision below conflicts with the case of *Medigen v. Public Serv. Comm'n*, 985 F.2d 164 (4th Cir. 1993), is not correct. Kleenwell argues that the issue in this case is identical to that in *Medigen*, but that the results are opposite. Kleenwell, however, ignores the critical distinction that the facts in each case are different. The different results are fully explained by the different factual records before the two appellate courts.

This factual difference was noted by the *Kleenwell* court below:

> The Fourth Circuit appears to have reached a different conclusion in *Medigen v. Public Serv. Comm'n of West Virginia*, 985 F.2d 164 (4th Cir. 1993), where it ruled that West Virginia may not deny a certificate of convenience and necessity to medical waste transporters engaged in interstate commerce. We note, however, that the Fourth Circuit found "no basis in the record . . . for concluding that competition in this market has had or will have any destructive effects." *Id.* at 167. Here, in contrast, there is extensive evidence in the record that supports the WUTC's finding that a regulated market is necessary to protect the health and safety of Washington residents. Indeed, the Fourth Circuit acknowledged that "where competition has destructive effects, regulation may be justified." *Id.*

Kleenwell Biohazard Waste v. Nelson, 48 F.3d at 400-401, n.13; Pet. App. 24(a), n.13.

The Fourth Circuit Court in *Medigen* did not hold that the Commerce Clause was an absolute bar to a state's certification requirement to collect waste that eventually goes out-of-state. Both courts agree that whether a certification requirement contravenes the Commerce Clause depends on the facts of each case. The court in *Kleenwell* found the factual basis for upholding Washington's statutory framework. The court in *Medigen* found no basis in the record before it to conclude that competition in the West Virginia market had any destructive effects. Both the court in *Medigen* and the court in *Kleenwell* agreed that regulation could be justified where competition has destructive effects. *Medigen*, 985 F.2d at 167. *Kleenwell*, 48 F.3d at 399-400; Pet. App. 22(a)-23(a).

There is, likewise, no inconsistency between the *Kleenwell* and *Medigen* cases on the proper standard for reviewing certification requirements under the Commerce Clause. The Fourth Circuit in *Medigen* concluded, based on the factual record before it, that the West Virginia certification requirement was unconstitutional under the more deferential balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Consequently, the *Medigen*, court found it unnecessary to decide whether a stricter standard should be applied.

Medigen, 985 F.2d at 166. Because the *Medigen* court expressly declined to decide what level of scrutiny to apply, there is no inconsistency between the two circuits on that issue.[7]

4. The Court of Appeals' Decision May be Affirmed Based on the Transportation of Waste Between Two Points in the Same State, Which is an Intrastate Movement Subject to State Regulation.

Kleenwell's reliance on *Medigen* is misplaced for another reason. In that case, the Fourth Circuit specifically noted that Medigen did not engage in transportation of medical waste from one point in West Virginia to another point in West Virginia. *Medigen*, 985 F.2d at 165. Because Kleenwell's customers have no intent to transport their waste out of state, Kleenwell's transportation of waste between two points in the state of Washington is intrastate in nature and subject to state regulation on that basis. *Baltimore & Ohio Southwestern R.R. v. Settle*, 260 U.S. 166, 173-74 (1922). Although not relied on by the Court of Appeals, this ground was raised below and would be a separate basis for the WUTC to defend its judgment if certiorari

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[7]In reference to the appropriate level of scrutiny, Kleenwell is incorrect in its argument at page 25 of its petition that the WUTC's decision contained no finding that the certificate requirement was the only way to achieve a legitimate local purpose as would be required under the test in *Maine v. Taylor*, 477 U.S. 131 (1986). In the "Factual Background" contained in the memorandum portion of its order, the WUTC expressly found that there were no obvious alternatives to the certificate requirement to assure universal solid waste collection service at reasonable rates. Pet. App. 57(a)-60(a). There is no requirement under the state APA that factual findings be numbered.

were granted. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

5. The Decision of the Court of Appeals Has No Impact on a State's Authority to Ban the Interstate Transportation of Waste.

Kleenwell's exaggerated claim that the Court of Appeals' decision "will change the nature of interstate commerce nationwide" (Pet. at 17) by allowing states to control the flow of waste at state borders is legally and factually erroneous. Pet. at 15-16.

The question of whether states can stop the free flow of waste at the state borders has already been determined in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), where this Court held that a state cannot constitutionally block the free flow of waste at the state border based solely on its origin. Nothing in the decision below conflicts with that holding.

As the Court of Appeals found, there is nothing in the Washington statutory scheme that blocks the flow of waste across the state's borders. Certificated carriers may, and do, transport waste out of state for disposal with no interference from the state of Washington. In its administrative order, the WUTC stated that a certificated carrier does not need to request WUTC approval to transport waste across state lines. Pet. App. 40(a)-41(a). Moreover, because the Washington statutory scheme is directed at only the local activity of waste collection, there is no

requirement for a certificate of convenience and necessity to import waste into Washington State or to export waste in long haul movements from a disposal site, transfer station, or other point of accumulation. Pet. App. 41(a).

6. The Court of Appeals Correctly Applied *University of Tennessee v. Elliott*.

When a state agency acting in its judicial capacity resolves factual issues which are properly before it and which the parties have had an adequate opportunity to litigate, federal courts in 42 U.S.C. § 1983 cases give the agency's factual findings the same preclusive effect they would be entitled to in the state's courts. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). The Court of Appeals correctly concluded that the administrative hearing before the WUTC met all the requirements of *Elliott*. *Kleenwell*, 48 F.3d at 394-95; Pet. App. 10(a)-12(a).

Kleenwell's claim of being denied an opportunity for a fair determination of the facts is disingenuous. First, the administrative proceedings were conducted by an administrative law judge from the state Office of Administrative Hearings, an independent state agency charged with conducting impartial administrative hearings. Wash. Rev. Code § 34.12.010. The WUTC affirmed the initial order of the administrative law judge.

Second, the claim that the fact finding was biased is quite remarkable since all the factual findings regarding Kleenwell's operations were based exclusively on Kleenwell's own testimony and exhibits. Kleenwell made its factual presentation before the WUTC based on a theory of law that it believed exempted it from state regulation. Kleenwell now seeks a second opportunity to make a different factual presentation based on the same theory of law. It is difficult to conceive of a clearer case for the application of collateral estoppel.

Kleenwell's complaint that it should get a second attempt to litigate whether medical waste is harmful is irrelevant. The Court of Appeals' decision addressed the Washington statutory scheme for solid waste collection, whether that waste is medical waste or some other type of waste. In any event, Kleenwell had a full and adequate opportunity to present before the WUTC any evidence supporting its theory of the case.

Kleenwell's sensational claims of the WUTC's abuse of procedure are baseless. In determining whether *Elliott* applied to the facts of this case, two levels of the federal judiciary have now reviewed the WUTC's procedures as applied to Kleenwell and have not found those procedures biased or otherwise deficient. And, of course, those courts have independently reviewed the constitutional question without giving any deference to the WUTC.

Kleenwell's claim that it could not file its civil rights action in federal court until the WUTC had issued its decision misstates the law. The WUTC's staff had earlier issued Kleenwell a warning letter to cease collecting waste in this state until it received a certificate authorizing it to do so. The WUTC had also issued a penalty assessment against Kleenwell for operating as a solid waste collection company without a certificate. A reasonable threat of a prosecution gives rise to a ripe controversy. *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1974). In the *Medigen* case relied on by Kleenwell, the federal plaintiff did file its complaint in federal district court upon the threat of prosecution. *Medigen*, 958 F.2d at 165. Kleenwell could have done likewise and was not "trapped" from filing its suit.

Finally, Kleenwell's reliance on *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936), is misplaced. That case involved the judicial review of the factual findings of an administrative agency, rather than the relitigation of those factual findings. Kleenwell's argument confuses judicial review of findings of fact, which it did not seek in the state courts, with relitigation of factual matters which it seeks but to which it is not entitled under *Elliott*. Kleenwell takes the contradictory approach of not seeking judicial review, and then citing cases on

the scope of judicial review to support the entirely different proposition that it may relitigate those facts.

CONCLUSION

For the foregoing reasons, the petitioners' petition for a writ of certiorari should be denied.

Respectfully submitted,

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